Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DAVID RUIZ, et al.,

Petitioners,

v.

REPRESENTATIVE JOHN CULBERSON and SENATOR J.E. ("BUSTER") BROWN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether persons seeking to intervene in federal litigation must have Article III standing, a question as to which there is a conflict among the circuits. Specifically, whether individual state and local legislators must have Article III standing to intervene as of right in a prison conditions case for the purpose of invoking the court's equitable jurisdiction to vacate a consent decree on grounds not raised by any existing party.

2. Whether the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(3)(F), confers on all individual state and local legislators an "unconditional right" under Fed. R. Civ. P. 24(a)(1) to intervene in prison and jail cases for the purpose of seeking termination of federal injunctive decrees.

LIST OF PARTIES

The parties are David Ruiz and the class of all present and future prisoners in the Texas Department of Criminal Justice; the United States of America as plaintiff-intervenor; state defendants Wayne Scott, Executive Director of the Texas Department of Criminal Justice, and Texas Board of Criminal Justice members Allan B. Polunsky, Carole S. Young, John R. Ward, John David Franz, Nancy Patton, Carol S. Vance, Patricia Day, Alfred C. Moran, and Alfred M. Stringfellow; and prospective intervenors Rep. John Culberson and Sen. J.E. ("Buster") Brown.

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OPINION BELOW

The opinion of the court of appeals (App. 1a-48a) is not yet reported.

JURISDICTION

The court of appeals entered its judgment on November 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution provides in part that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

The Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, provides in part that:

§ 3626(a)(3)(F):

> Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief, and shall have the right to intervene in any proceeding relating to such relief.

Other pertinent provisions of the PLRA are set forth in the Appendix, *infra*, at 60a-62a.

Rule 24(a)(1) of the Federal Rules of Civil Procedure provides:

> "(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene . . . "

STATEMENT OF THE CASE

1. Proceedings below

Petitioners David Ruiz, et al., are the class of Texas prisoners. As the result of a lengthy trial, conditions in Texas prisons were found to violate the Eighth Amendment prohibition of cruel and unusual punishment. Injunctive relief was granted, and the process of remedying constitutional violations was begun. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982). In March 1990, the district court ordered the parties to negotiate a comprehensive final decree that would eliminate injunctive relief no longer needed to ensure constitutional conditions. The Final Judgment in this case was the end result of the court-ordered negotiation.

The state defendants affirmatively requested the district court to approve the Final Judgment. The district court entered it on December 14, 1992. In considering whether to approve the Final Judgment, the district court held an evidentiary hearing and received oral testimony

and documentary evidence in support of the Judgment. The Director and Deputy Director of the Texas Department of Criminal Justice and the Chairman of the Board all testified in support of the Judgment and urged the court to approve it. Based on the evidence received at the hearing, the court made extensive findings of fact concerning the Judgment, noting the pressures on Texas prisons and the state defendants' ability to provide the minimal necessities to comply with the Eighth Amendment. The court found that the Judgment's provisions were needed "to ensure that prisoners' constitutional rights will be safeguarded in the future."

Though prospective intervenors Brown and Culberson were members of the Texas Legislature in 1992, neither objected to the Final Judgment or sought to be heard in the proceedings leading to its approval. Four years later they moved to intervene, contending that the newly enacted Prison Litigation Reform Act (PLRA) gives any state or local legislator the absolute right to intervene in any federal action concerning jail or prison injunctive decrees. They sought affirmatively to invoke the district court's jurisdiction to grant relief from the Final Judgment in this case.

Specifically, Brown and Culberson moved the district court "to invoke its remedial powers, including the Declaratory Judgment Act, or the All Writs Act, or the rules of equity, to immediately terminate all federal court jurisdiction over the Texas prison system . . . " Supplemental Motion and Brief in Support of Motion of Texas Representative John Culberson and Texas Senator J.E. "Buster" Brown to Terminate Federal Jurisdiction over

the Texas Prison System (App. 53a). Brown and Culberson moved to intervene "for the sole purpose of terminating" the court's Final Judgment on the grounds that it:

> (1) invades the core of sovereign authority reserved to the States by the structure of the "compound republic" of America as expressed by the Tenth Amendment to the U.S. Constitution; (2) violates the Guarantee Clause; (3) violates the Eleventh Amendment; (4) violates principles of federalism and comity; (5) exceeds the requirements of the Eighth Amendment and thus exceeds the Court's remedial powers; (6) violates the Prison Litigation Reform Act, 18 U.S.C. § 3626, and/or (7) is null and void because the 1992 *Ruiz* settlement agreement was a void contract from its inception because its key terms and effects were materially misrepresented.

App. 6a n.5; 52a.

Brown and Culberson urged that the PLRA "obligates the district court to first rule on intervenors' Tenth Amendment and Guarantee Clause claims" before reaching the issues raised by the existing parties to the suit. App. 53a.

The motion of Brown and Culberson has a political background. Brown ran unsuccessfully for office against the former Texas Attorney General. Brown and Culberson introduced legislation authorizing the Texas Legislature to intervene in this case, but the legislation failed. Brown and Culberson then set up a political campaign committee (PAC) called "The Fund to Take Back Texas Prisons, Inc.," which held fund-raising events to pay for their attorneys and for their own political purposes.

Both the plaintiff class and the state defendants, through the state attorney general, opposed their motion to intervene. The district court denied intervention, and Brown and Culberson appealed.

2. The decision of the Court of Appeals

The Fifth Circuit concluded that a provision of the PLRA, 18 U.S.C. § 3626(a)(3)(F), grants Brown and Culberson "an unconditional right to intervene" within the meaning of Fed.R.Civ.P. 24(a)(1). App. 2a. First, the court held that Brown and Culberson were the type of officials to whom Congress granted a right to intervene. The court based its decision on the 1997 amendment to the statute adding the words "including a legislator" to existing language authorizing certain "state and local official[s]" to intervene. App. 10a. The court acknowledged that the statute permits officials or legislators to intervene only if their "jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities." The court also acknowledged that appropriation of funds "requires the action of the legislature as a unit or whole." *Id.* The court reasoned, however, that appropriations also require the action of individual legislators. The court concluded that Congress must have meant to allow individual legislators to intervene, else the addition of "including a legislator" would be meaningless. App. 12a. Relying on newspaper articles, the court said that the amendment adding these words was in response to its own earlier decision expressing doubt about the standing of Brown and Culberson to intervene. *Id.* at 14a-15a.

Second, the court held that the Final Judgment is a "prisoner release order" within the meaning of the PLRA intervention provision. App. 16a-17a. The court first concluded that the Final Judgment in this case is an "order" and not a "consent decree" as in *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (distinguishing between litigated "orders" and "consent decrees" under Title VII). The court recognized that the Final Judgment in this case is indeed a "consent decree." App. 19a. The court reasoned, however, that in the PLRA Congress meant to include a "consent decree" within the definition of "prisoner release order." App. 19a-27a. The court further held that the Final Judgment in its entirety is a "prisoner release order" even though only one of its 21 provisions, Section XIII, limits the capacities of certain specified Texas prisons. App. 27a-31a.

The Fifth Circuit then found that the intervention of Brown and Culberson was "timely" as required by Rule 24(a). Though the case was begun in the 1970's and other legislators testified at trial, and though the Final Judgment was approved in 1992 when Brown and Culberson were in the Legislature and raised no objection to its approval, the court below concluded that they timely intervened in 1996 after enactment of the PLRA. App. 33a. The Fifth Circuit rejected the district court's timeliness analysis, which focused on when Brown and Culberson knew of whatever "interest" they have. The Fifth Circuit stated that the district court's analysis may be acceptable for barring intervention under Rule 24(a)(2) ("interest intervention") or Rule 24(b) ("permissive intervention"), but it is not acceptable under Rule 24(a)(1),

where the right to intervene is "absolute and unconditional." App. 32a, 34a.

Having determined that Brown and Culberson had an "unconditional" right to intervene under the PLRA, the court then considered whether intervenors had to possess Article III standing. App. 35a-48a. The court expressed doubt that Brown and Culberson would have standing if they were the only parties seeking termination of the Final Judgment. *Id.* at 37a. The court *assumed* that Brown and Culberson lack Article III standing. *Id.* at 37a-38a. The court held that "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." App. 38a. The court decided that it made no difference that Brown and Culberson were seeking relief on grounds not advanced by any existing party. *Id.* at 46a-47a.

The court expressly disagreed with decisions by three circuits that require any intervenor to have Article III standing. *Id.* at 38a, 42a. The court relied on decisions of other circuits that it believed were better reasoned. *Id.* at 43a, 44a-45a.

Based on the foregoing analysis, the court reversed the district court's decision denying intervention, and issued its mandate forthwith. App. 48a. The court denied petitioners' motion to recall and stay the mandate pending disposition of a petition for writ of certiorari. App. 59a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision, in conflict with the decisions of three other circuits, greatly expanded the universe of persons who can claim an absolute right to participate in federal litigation without satisfying Article III standing requirements. By holding that Article III does not require intervenors to possess standing independent of the original parties, App. 38a, the court answered a question expressly left open in *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). There are especially strong reasons for requiring independent standing in this case because the prospective intervenors affirmatively invoke the district court's jurisdiction and seek relief on grounds not raised by any party. In addition, the Fifth Circuit expansively interpreted PLRA provisions to give *any* state or local legislator an "unconditional right" to intervene in *any* prison or jail case to seek termination of federal injunctive decrees.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER INTERVENORS MUST HAVE ARTICLE III STANDING

The Court has remarked that the issue of intervenor standing has produced "anomalous" decisions among the circuits. *Diamond v. Charles*, 476 U.S. 54, 68 n.21 (1986) (citing cases). The District of Columbia, Seventh and Eighth Circuits hold that Article III standing is required. *See Building and Constr. Trades Dept. v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *City of Cleveland v. Nuclear Regulatory Commission*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)

("because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties"); *Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) ("the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court").[1]

While acknowledging the existence of these decisions, the court below elected to follow the "better reasoning" of decisions in the Ninth, Eleventh and Second Circuits. App. 43a. It read *Yniguez v. State of Arizona*, 939 F.2d 727 (9th Cir. 1991), *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989), and *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978), as holding "that Article III does not require intervenors to possess standing." App. 43a.[2]

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[1] *Accord, Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (Senator Helms lacked standing despite allegation of need to cast intelligent vote on affected legislation); *People Who Care v. Rockford Board of Educ.*, 179 F.R.D. 551, 560 (N.D. Ill. 1998); *cf. Harris v. Reeves*, 946 F.2d 214 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1516 (1992) (district attorney lacked standing to intervene in prison conditions case).

[2] In fact, the court below read too much into the cases:

> *Yniguez* held that if no original party appeals, an intervenor must have Article III standing to appeal. 939 F.2d at 731. The court concluded that the intervenors there *did* have standing, not that it was unnecessary. *Id.* at 733-34. (This Court expressed "grave doubts" that they had standing, and reversed

The Court should grant certiorari to resolve the conflict in the circuits and put an end to the varying "anomalous" decisions in the lower courts. It should decide that persons seeking to intervene in federal litigation must possess Article III standing.

Yniguez on other grounds. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997).)

Chiles held that an intervenor's interest under Rule 24(a)(2) must be particularized and not a generalized grievance. 865 F.2d at 1212. The court did say that an intervenor need not have an Article III interest beyond the interest required by Rule 24(a)(2), but it left open what the intervenor must establish if he "seeks to raise a claim unrelated to a cause or controversy that already exists." *Id.* at 1213 n.17. In other words, the court did not hold that intervenors did not require independent standing regardless of the issues they seek to raise. *See* pp. 17-18, *infra*.

United States Postal Service held that the prospective intervenor's interest in that case was not inadequately represented as required by Rule 24(a)(2). 579 F.2d at 190. While the court said that because there was a case or controversy between the original parties, the would-be intervenor need not have independent standing, this was mere dictum.

Curiously, the court below also cited *Associated Builders & Contractors v. Perry*, 16 F.3d 688 (6th Cir. 1994), but that case held that the intervenors lacked standing to appeal. The state had elected not to appeal, and the court held that Article III standing was required of the appellant. 16 F.3d at 690.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER INTERVENORS WHO LACK ARTICLE III STANDING MAY INVOKE FEDERAL JURISDICTION FOR THE PURPOSE OF LITIGATING ISSUES NOT RAISED BY ANY PARTY

This case presents the nationally important issue of whether intervenors who do not have Article III standing may invoke federal jurisdiction for the purpose of litigating issues not raised by any party. The court below held that Brown and Culberson need not possess Article III standing and yet allowed them to force litigation of several constitutional issues not raised by any existing party.

A. Individual Legislators Brown And Culberson Lack Article III Standing

In holding that Article III standing is not required under the PLRA, the court below doubted that Brown and Culberson had such standing and assumed *arguendo* that they did not have standing. App. 37a-38a. Under this Court's precedents, it is clear that they could not establish standing to initiate federal litigation.

Legislators do not, simply by virtue of their status as persons who vote on laws and appropriations, acquire Article III standing. *Raines v. Byrd*, 117 S. Ct. 2312 (1997). "At an irreducible minimum, Article III requires the party who invokes the court's authority 'to show that he personally has suffered some actual or threatened injury . . . ' " *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 472 (1982). The presence of a "sharp and acrimonious" disagreement is insufficient, as are a prospective party's "value interests." *E.g., Diamond v.*

Charles, 476 U.S. 54, 62 (1986). Rather, a "party seeking judicial resolution of a dispute [must] 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct.' " *Id.*, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The "generalized interest of all citizens in constitutional governance" is too abstract to serve as the concrete injury necessary to standing. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974).

In the Court's most recent word on legislator standing, *Raines v. Byrd, supra*, the Court held that federal Representatives and Senators lacked Article III standing to challenge a federal statute regarding the Presidential "line item veto" of appropriations. The Court reemphasized the same standing principles stated above. For example, even a member of Congress "must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." 117 S. Ct. at 2317. As is true of Culberson and Brown here, the Congressmen in *Raines* had "not been singled out for specially unfavorable treatment as opposed to other members of their respective bodies." *Id.* at 2318. Brown and Culberson made no attempt to show any injury personal to them. They did not demonstrate that their interest is in any way different from the interest of any of the other 150 state representatives or 31 state senators. Finally, it is "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 2318 n.3.

In *Raines v. Byrd*, the Court found it important that the legislators there had "not been authorized to represent their respective Houses of Congress in this action." *Id.* at 2322. Similarly, Brown and Culberson did not demonstrate that they are authorized to sue on behalf of the Texas Legislature or anyone else. Indeed, they introduced legislation seeking to authorize the Legislature to intervene in this case for the very purpose of terminating the Final Judgment, and it *failed*.[3] Since the Legislature decided not to intervene, these two minority legislators can hardly claim to represent the state's interests. They should not be permitted to accomplish through litigation what they failed to achieve by legislation.[4]

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[3] *Cf. Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986) (named defendant sued in official capacity as member of school board lacked standing to appeal: "Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

[4] Ironically, authorizing dissident legislators to speak for the state's interests violates the very Tenth Amendment and Guarantee Clause principles that Brown and Culberson espouse. There are two interests in this litigation: the prisoner-plaintiffs' interest in constitutional conditions and the state's interest in managing its prisons free of unnecessary interference. Congress has no power to specify who represents the core interests of the state. That is a sovereign function that was never delegated to Congress and is reserved to the states. Just as Congress could not dictate that the general counsel for the Department of Criminal Justice, rather than the state Attorney General, must represent the state prison system in any case involving the constitutionality of prison conditions, it has no power to authorize individual legislators to represent the state's interests in this (or any other) litigation.

After all, Texas has duly elected and appointed state officials with direct responsibility for running the prison system (the

Because Brown and Culberson do not differentiate themselves in any way from any other legislator or

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Board of Criminal Justice and the Executive Director of the Department of Criminal Justice), for appropriating funds to run the system (the Legislature as a whole) and for representing the state's interests in cases like this one (the Attorney General). To authorize two individuals to represent core state interests in the prisons is to gut the representative nature of the state's government.

"Through the structure of its government, and the character of those who exercise government authority, a state defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "Congressional interference" with the decisions of a state's people, "defining their constitutional officers, would upset the usual constitutional balance of federal and state powers." *Id.* At stake is "the authority of the people of the states to determine the qualifications of their most important government officials. It is an authority that lies 'at the heart of representative government' [quoting from *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)]. It is a power reserved to the states under the Tenth Amendment and guaranteed to them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " *Id.* at 463.

The Tenth Amendment ensures that lines of "political accountability" are not blurred. *Koog v. United States*, 79 F.3d 452, 457, 460 (5th Cir. 1996). Yet here, allowing Brown and Culberson, outvoted by the Legislature, to represent the core interests of the entire state of Texas, gives them power for which they are not politically accountable. To the extent they are accountable, it is only to their particular constituents in their districts, not to the state as a whole or its people. Empowering them to represent the state's interests effectively disenfranchises the citizens who did not elect them but did elect the Attorney General, the Governor (who appoints the Board of Criminal Justice) and the majority of the Legislature. The people of Texas did not elect Brown and Culberson to represent their interests in this litigation. It is beyond the power of Congress to

elected official, and because they do not have any personal stake in the controversy, they lack standing under Article III to invoke federal jurisdiction.

B. Intervenors Who Seek Relief On Grounds Not Raised By Any Party Must Establish Article III Standing In Their Own Right

The prospective intervenors do not simply seek to present their views as *amici curiae* or to support the state defendants' position. Rather, they seek independently to invoke the court's jurisdiction "under the Declaratory Judgment Act, the All Writs Act, and the rules of equity" to terminate federal jurisdiction over the Texas prison system. App. 57a. Their proposed intervention is "for the sole purpose" of invoking the court's authority to terminate jurisdiction. In attempting on their own behalf to invoke the court's authority and obtain equitable relief, they advance novel legal and constitutional claims not made by any party, including claims based on the Tenth

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substitute a federal judgment for the state's judgment about how this litigation should be conducted and what the state's true interests are. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992); *cf. Printz v. United States*, 117 S. Ct. 2365, 2376 (1997) (Constitutional system of "dual sovereignty" includes state power to determine the officers that administer its laws). Just as the federal government cannot tell a state where to locate its capitol, *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), Congress has no power to designate individuals like Brown and Culberson to represent core state interests in this case.

Amendment, the Eleventh Amendment and the Guarantee Clause.

Moreover, under the PLRA, intervenors apparently are empowered to move to terminate injunctive relief even if it is a consent decree voluntarily entered into by the governmental defendants. Under § 3626(b)(2), an "intervenor" is authorized to file a motion to terminate such a decree. Further, under the "automatic stay" provision of the PLRA, the mere filing of such a motion and the passage of 30 days triggers an automatic suspension of the judgment.[5] This is an awesome power to confer on an intervenor, especially in cases in which an intervenor seeks to void a consent decree that the governmental entity is entirely satisfied with and, as with the Final Judgment in this case, actually requested the district court to approve. Brown and Culberson have already announced in the court below their intention to enforce the automatic stay provision premised on their own motion to terminate the Final Judgment. As Judge Easterbrook remarked in holding that Article III standing is required of any intervenor, the intervenor "seeks control of the suit" and asserts a right "to conduct the case in a way that may undermine the interests" of the existing

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[5] The applicability and constitutionality of the automatic stay provision are before the Fifth Circuit in two other appeals in this case, Nos. 98-20233 and 98-20841.

parties. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988).[6]

Regardless of whether any intervenor in any kind of case must have Article III standing, there are compelling reasons for requiring such standing in a case like this one. The court below held, however, that no Article III standing was necessary, at least where there is a case or controversy between the existing parties and the "ultimate" relief sought by the intervenor is also being sought by an existing party. App. 38a. This reasoning ignores what it is that defines a "case" or "controversy." Moreover, it would allow Congress to confer on not just legislators but taxpayers, homeowners, parents and virtually anyone an absolute right to participate in any kind of federal litigation.

It is not enough that the existing parties have a live dispute. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues*." *Allen v. Wright*, 468 U.S. 753, 750-51 (1984), *quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added). Put another way, the question is whether the party is entitled "to an adjudication *of the particular claims asserted*." *Allen v. Wright, supra*, 468 U.S. at 752 (emphasis added). Whether there is an

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[6] *Accord, People Who Care v. Rockford Board of Educ.*, 179 F.R.D. 551, 560 (N.D. Ill. 1998):

> "Intervenors participate on an equal footing with the original parties to the suit. Therefore, a movant for leave to intervene must satisfy the same Article III requirements as the original parties, including the requirement of standing."

Article III case or controversy does not depend on the existence of a dispute between the original parties but on the *issues* in dispute. *Cf. Tribovich v. United Mine Workers of America*, 404 U.S. 528, 537-38 (1972) (union member's intervention limited to issues raised by Secretary of Labor); *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (requiring nexus between "the litigant and the claim he presents"). It does not matter that, in the lower court's terms, the intervenors seek the same "ultimate" relief – in this case, termination of the injunction – because they seek adjudication of constitutional issues not raised by the existing parties.[7]

There is no case or controversy between the plaintiff class and Brown and Culberson: they could not sue each other. Nor is there a case or controversy between the prospective intervenors and the state defendants: *they* could not sue each other. The fact that there remains a case or controversy between the plaintiff class and the state defendants does not eliminate the standing requirement for intervenors, because Brown and Culberson seek to introduce new constitutional claims not raised by the

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[7] In fact, Brown and Culberson seek relief *beyond* that sought by the state defendants. That is, not only do they introduce constitutional issues not raised by the existing parties, but they contend on several grounds that the district court was without power to enter the Final Judgment and that it was void *ab initio*. App. 50a, 52a. The state defendants, however, seek only the relief authorized by the PLRA, *viz.*, termination of the decree, not complete nullification of the Judgment. *Cf. Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 662 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998) (PLRA authorizes termination only of prospective relief, not consent decree itself); *Benjamin v. Jacobson*, 124 F.3d 162, 178-80 (2d Cir. 1997) (same).

state defendants and request relief beyond that sought by the state defendants. If they are allowed to demand that their novel claims be adjudicated, they will receive an advisory opinion on the constitutional issues they want litigated. This runs afoul of standing restrictions on "a litigant's raising another person's legal rights" (in this case, the rights of the State of Texas)[8] and barring "adjudication of generalized grievances" like the Tenth Amendment and Guarantee Clause claims made by Brown and Culberson. *See Allen v. Wright*, *supra*, 468 U.S. at 751; *Schlesinger*, *supra*, 418 U.S. at 217.

C. The Statute Cannot Confer Article III Standing

If all that were required for intervention is a live dispute between the existing parties, Congress would be empowered to require the courts to allow a wide variety of persons with no Article III standing to participate fully in all kinds of federal litigation. For example, taxpayers – who foot the bill for prisons and jails – could be authorized to intervene as of right in any prison or jail case. Homeowners near prisons and jails could be authorized to intervene. Parents whose children walk near prisons and jails could be authorized to intervene. (All of these have a more direct interest in the prisons and jails than Brown and Culberson.) Indeed, Congress could authorize anyone to intervene in any kind of case, provided only that there is a case or controversy of some kind between the original parties.

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[8] *See* note 4, *supra*.

The court below decided, in essence, that Congress can create standing to litigate simply by so decreeing, without altering the person's underlying legal relationship to a case or controversy. That is, the court held that because Congress amended the PLRA to authorize any "legislator" to intervene, therefore any legislator has an "unconditional right" to intervene under Rule 24(a)(1) – without regard to whether the intervenor has Article III standing.

But the PLRA, as an act of Congress, obviously cannot override the constitutional requirements under Article III. *Raines v. Byrd*, *supra*, 117 S. Ct. at 2318 n.3; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). While the Court in *Diamond v. Charles*, *supra*, found it unnecessary to decide whether a party seeking to intervene "must satisfy not only the requirements of Rule 24(a)*(2)*, but also the requirements of Art. III," 476 U.S. at 68-69 (emphasis added), in the present case Brown and Culberson assert an "unconditional" right to intervene under Rule 24(a)*(1)*, without demonstrating *either* the type of "interest" required by Rule 24(a)(2) *or* Article III standing. The Court should grant certiorari to limit the scope of PLRA intervention to persons who possess Article III standing to litigate the issues they raise.

D. The Lower Court's Expansive Interpretation Of The PLRA Intervention Provision Improperly Grants All State And Local Legislators An Unconditional Right To Seek Relief Beyond That Sought By Any Existing Party

1. The Court Below Read All Conditions On Legislator Intervention Out Of The Statute

Statutes that confer an "unconditional right to intervene" under Rule 24(a)(1) are few and far between. *See generally* Wright, Miller & Kane, *Federal Practice and Procedure*, § 1906 (1986). The most prominent example is 28 U.S.C. § 2403, conferring on the United States the right to intervene in an action contesting the constitutionality of an Act of Congress. The few other statutes that have been held – hesitantly, in most cases – to grant a truly "unconditional" right do so for persons who basically possess sufficient interests as to enable them to intervene under Rule 24(a)(2). *See* Wright, Miller & Kane, *supra*, at p. 247.

Section 3626(a)(3)(F) of the PLRA does not grant Brown and Culberson an "unconditional right" to intervene. Brown and Culberson are not a "unit of government" such as the State, the Legislature, a county or a government agency such as the Texas Department of Criminal Justice. Nor are they charged with the "prosecution or custody" of anyone. Finally, Brown and Culberson do not have "jurisdiction" to appropriate funds; nor is it their "function." Not only are they not the Legislature, but they are a tiny minority of legislators, outvoted by the majority. State law – the sole source of their power – does not vest in them any jurisdiction over prisons.

The court below, however, reasoned that appropriations require not only the action of the legislature as a whole but also the action of individual legislators. App. 10a-12a. It concluded that *every* legislator's "jurisdiction or function" therefore includes appropriations. In short, the court read the qualifying language out of the statute as regards legislators. Consequently, *any* state or local legislator has an absolute right to intervene to terminate injunctive relief in *any* prison or jail case. The Fifth Circuit's rationale for this construction is that the "including a legislator" amendment would otherwise be meaningless. App. 12a. But its own construction in turn rendered the appropriations qualification meaningless as to legislators and disregarded the Article III standing principles discussed in point I, *supra*. And the Fifth Circuit's doubts about whether intervening legislators could block a settlement between the state defendants and the plaintiffs, and whether the intervenors could appeal an adverse decision if the defendants elected not to appeal (App. 47a n.28), are inconsistent with the court's conclusion that the PLRA grants an "unconditional" right to intervene.

2. The Final Judgment Is Not A "Prisoner Release Order"

The intervention provision of the PLRA allows officials and legislators to intervene *only* with regard to a "prisoner release order." § 3626(a)(3)(F). "Prisoner release order" is defined as an order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." § 3626(g)(4). The Final Judgment is not a "prisoner release order." It is a consent decree, not an

"order" of the court within the meaning of the PLRA. *See Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-22 (1986) (consent decree not "order" proscribed by Title VII). Not mentioned by the court below is the PLRA provision requiring that a "prisoner release order" be granted only by a three-judge court. § 3626(a)(3)(B). There obviously has never been a three-judge court in this or any other pre-PLRA case. It would make little sense – and be a total waste of scarce judicial resources – to require convening of a circuit judge and two district judges to approve a stipulated consent decree. A "prisoner release order" must be limited to the narrow class of contested proceedings in which the state is being forced to release prisoners.

Further, the Final Judgment includes a wide variety of provisions, terminating the court's jurisdiction over most issues, narrowing relief regarding others and specifying a few injunctive measures that are continuing. Of the continuing injunctive provisions, *none* requires prisoner releases. The provisions deal with internal prison practices and conditions that the district court found unconstitutional. Examples include medical care, psychiatric treatment, disciplinary procedures, etc., having nothing to do with prisoner releases.

The only provisions of the Final Judgment that arguably fall within the PLRA definition of "prisoner release order" are the parts of Section XIII identified by the court below. (The court failed to mention the other 21 sections of the Judgment.) But under current circumstances, this Section is *not* a "prisoner release order." Section XIII has had *no* actual effect on Texas prison

population. While it does limit the capacity of certain designated prisons, it does not limit the capacity of most Texas prisons at all, or of the total Texas prison population. It does not affect the construction or acquisition of any facilities for use as prisons. It does not implicate any Congressional concern for "early" releases of convicted felons or closing prison doors to new admissions.

For all these reasons, Section XIII is not a "prisoner release order," and the PLRA therefore does not grant Brown and Culberson an unconditional right to intervene.[9]

Of course, even if some provisions of Section XIII were deemed to be a "prisoner release order," there is no PLRA right to intervene with regard to any *other* provision of the Final Judgment. Brown and Culberson do not have an "unconditional" right to intervene for the purpose of having the *entire* Final Judgment terminated. Yet this is precisely what they seek. Moreover, they seek this relief on grounds that find no textual support whatever in the PLRA – that the *entire* judgment violates the Tenth Amendment and the Guarantee Clause and even that it was void *ab initio* because its terms were "materially

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[9] In *Tyler v. Murphy*, 135 F.3d 594 (8th Cir. 1998), the district court order specifically prescribed an absolute 20-prisoner cap on probation violators in the jail, which in fact caused the jailer to reject new admissions. 135 F.3d at 595. The dictum that this was a "prisoner release order" was not accompanied by any analysis and the point was not a contested issue on appeal. There was no intervention issue in *Tyler*.

misrepresented." App. 52a.[10] The court below plainly erred in holding that the PLRA gave Brown and Culberson an "unconditional" right to intervene under Rule 24(a)(1) to demand adjudication of these claims. The scope of any intervention is in fact conditioned and confined by the statute.

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[10] *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 662 (1st. Cir. 1997), *cert. denied*, 118 S. Ct. 2366 (1998), held that the PLRA authorized termination only of prospective relief and that the consent decree itself would not be vacated. In *Benjamin v. Jacobson*, 124 F.3d 162, 178-80 (2d Cir. 1997), the court held that the PLRA could be invoked only to terminate prospective relief, not a consent decree itself, and the decree might continue to be enforceable as a contract in a state court. 124 F.3d at 180. The point here is that nothing in the PLRA gives Brown and Culberson a right to contend that the court's judgment is void on grounds extraneous to the PLRA.

CONCLUSION

For the reasons stated, the Court should grant certiorari and reverse the decision below.

Dated: January 1999

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-21003

DAVID R. RUIZ; ET AL.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee,

versus

W.J. ESTELLE; TEXAS BOARD OF CORRECTIONS,

Defendants-Appellees,

versus

REPRESENTATIVE JOHN CULBERSON; SENATOR J.E. BROWN,

Movants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

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(Filed Nov. 20, 1998)

Before KING, GARWOOD and HIGGINBOTHAM, Circuit Judges.

GARWOOD, Circuit Judge:

This case involves the attempt by appellants, two Texas state legislators, to intervene in the long pending

suit concerning Texas prison conditions, which began more than twenty-five years ago. The district court denied appellants' motion to intervene under Fed. R. Civ. P., Rules 24(a)(1), 24(a)(2), and 24(b)(2).[1] Because we conclude that 18 U.S.C. § 3626(a)(3)(F) grants the appellants "an unconditional right to intervene" in this case within the meaning of Rule 24(a)(1), we reverse.

In 1972, class-action plaintiffs David Ruiz, et al. (plaintiffs), initiated litigation against the Texas prison authorities, now the Texas Department of Criminal Justice-Institutional Division (TDCJ), for constitutional violations in Texas prisons. *See generally Ruiz v. Estelle*, 503 F.Supp. 1265 (S.D. Tex. 1980), *rev'd in part*, 679 F.2d 1115 (5th Cir. 1992), *modified in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1438 (1983). After a lengthy trial, the district court ordered injunctive relief, and this Court largely affirmed. *See id.* Thereafter, the district

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[1] "**Rule 24. Intervention.**

(a) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the application claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a common question of law or fact. . . . "

court assumed a supervisory role over Texas prison conditions. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987).

In 1990, the district court ordered the parties to begin negotiations to bring about a comprehensive final order in the case, including timetables for termination of the court's jurisdiction. *See Ruiz v. Collins*, Civil No. H-78-987-CA (S.D. Tex. Dec. 11, 1992) (Memorandum Opinion Accompanying Order Approving Final Judgment). After notice and evidentiary hearing, the district court entered the parties' agreed Final Judgment in December 1992, which terminated the district court's jurisdiction in all but eight substantive areas. One of these eight areas was prison population and crowding conditions.

In March 1996, the TDCJ moved to terminate the Final Judgment, and accordingly end the district court's supervision over Texas prisons. On April 26, 1996, the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, Pub. L. 104-134, Title VIII, Sec. 802(a), 110 Stat. 1321-66, was signed into law by President Clinton. On May 21, 1996, appellants filed a motion to intervene in the district court, and a proposed motion to vacate the December 1992 Final Judgment, pursuant to the PLRA. In June 1996, plaintiffs filed an opposition to TDCJ's motion to terminate, and plaintiffs and TDCJ filed their respective oppositions to appellants' motion to intervene. On September 6, 1996, TDCJ filed a supplemental motion to vacate the December 1992 judgment and terminate the district court's jurisdiction under the PLRA; later that month plaintiffs filed an opposition to the motion. As of the time this case was orally argued before us in October 1998, TDCJ's motion to terminate was still pending and had not

been ruled on. On August 29, 1997, appellants filed a motion for expedited ruling on their motion to intervene and on their therewith tendered motion to terminate. By order signed November 21 and entered November 24, 1997, the district court denied appellants' motion to intervene. On November 26, 1997, President Clinton signed into law amendments to the PLRA. Pub.L. 105-119, § 123(a), 111 Stat. 2470. On December 4, 1997, appellants filed their motion to reconsider the district court's November 24, 1997, order denying their motion to intervene, raising, inter alia, the November 1997 amendments to the PLRA. Plaintiffs and TDCJ opposed the motion. Also on December 4, appellants filed a protective notice of appeal from the November 24 order. On January 28, 1998, the district court denied appellants' motion for reconsideration, and on January 29, 1998, appellants filed an amended notice of appeal as to both the November 24 and the January 28 orders.

The PLRA narrowly limits the relief which a federal court may order in prisoner suits. See section 3626. It prohibits a federal court from ordering any prospective relief "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary. . . . " *See* section 3626(a)(1)(A). Moreover, the PLRA authorizes the termination of existing prospective relief that does not comply with these limits. *See* section 3626(b)(2).[2] *See also Plyler v. Moore*, 100 F.3d

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[2] Section 802(b)(i) of Pub. L. 104-134, 110 Stat. 1321-70, provides:

> "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to

365, 369 (4th Cir. 1996) ("The PLRA also provides an avenue for states to end their obligations under consent decrees providing for greater prospective relief than that required by federal law."). The PLRA grants certain governmental officials the right to intervene in relevant litigation.[3] This intervention provision forms the basis of the present appeal.

I. Whether the PLRA Applies

Appellants, Texas State Senator J.E. "Buster" Brown and Texas State Representative John Culberson (appellants or 'Brown and Culberson'), seek to intervene in the

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> all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

[3] The PLRA as amended in November 1997 states, in pertinent part:

> "Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief." Section 3626(a)(3)(F)

The legislation affecting the November 1997 PLRA amendments provides that "The amendments made by this Act shall take effect upon the date of the enactment of this Act and shall apply to pending cases." Pub.L. 105-119, § 123(b), 111 Stat. 2471.

termination action brought by TDCJ.[4] TDCJ, Brown, and Culberson seek the very same ultimate relief, namely termination of the Final Judgment. However, appellants contend that TDCJ is not adequately pursuing this goal. Specifically, Brown and Culberson object to the TDCJ's claimed failure to assert alternative arguments for termination of the Final Judgment, including arguments under the Tenth Amendment, Eleventh Amendment, and Guarantee Clause of the United States constitution.[5]

Brown and Culberson moved to intervene pursuant to Fed. R. Civ. P. 24(a)(1) ("Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene"), contending that the PLRA granted them an unconditional right to intervene. The district court held that the PLRA's intervention provision applies neither to appellants nor to this case. Finding error as to each of these grounds, we reverse.

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[4] Both TDCJ and plaintiffs oppose the intervention. They are sometimes herein referred to collectively as appellees.

[5] Brown and Culberson wish to argue, *inter alia*, "that perpetual federal jurisdiction over the Texas prison system: (1) invades the core of sovereign authority reserved to the States by the structure of the 'compound republic' of America as expressed by the Tenth Amendment to the U.S. Constitution; (2) violates the Guarantee Clause; (3) violates the Eleventh Amendment; (4) violates principles of federalism and comity; . . . and/or (7) is null and void because the 1992 *Ruiz* settlement agreement was a void contract from its inception because its key terms and effects were materially misrepresented."

Our holding today in no way reflects a judgment about the merits of these arguments.

A. Including A Legislator

At the time Brown and Culberson initially moved to intervene in May 1996, the PLRA, 18 U.S.C. § 3626(a)(3)(F), granted a right to intervene to:

> "[a]ny state or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order. . . . "

In October 1996, while the motion to intervene was still pending before the district court, TDCJ sought to appeal to this Court the district court's failure to promptly rule on TDCJ's referenced motions to terminate, and in February 1996 Brown and Culberson filed with this Court a motion to intervene in that appeal. We denied Brown and Culberson's motion as inappropriate because the district court had not yet ruled on Brown and Culberson's initial motion. *See Ruiz v. Scott*, No. 96-21118 (unpublished) (5th Cir. Aug. 6, 1997) (we also dismissed TDCJ's appeal). However, we then expressed the view that it was "at best doubtful that either Representative Culberson or Senator Brown is that sort of state or local official or unit of government to whom or which section 3626(a)(3)(F) grants a right to intervene." *Id.*[6] Indeed, we made this remark in response to arguments made by

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[6] This language was later withdrawn. *See Ruiz v. Scott*, 96-2118 (5th Cir. Oct. 30, 1997) (order denying rehearing *en banc*).

TDCJ and plaintiffs, which mirror the arguments appellees urge on the present appeal.[7]

Following our lead, the district court held that Brown and Culberson did not fall within the statute's definition of "state or local official." *See Ruiz v. Scott*, Civil No. H-78-987 (S.D. Tex., Nov. 24, 1997). The district court determined that the qualifying "jurisdiction or function" language of section 3626(a)(3)(F) applies to "state and local official[s]" as well as to "unit[s] of government." The court held that Brown and Culberson do not have the "jurisdiction or function" of appropriating funds. Only a collective body and no individual legislator can have the 'jurisdiction' or 'function' of appropriating funds. Texas law vests authority to appropriate funds with the legislative body as a whole, not with individual legislators. *Id. See also Vernon's Ann. Tex. Const.* Art. 8 § 6 (1998) ("No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law. . . . "). Therefore, the district court held that individual legislators were not state officials of the kind covered by the intervention provision.

Significantly, the district court found the absence of the words "individual legislators" indicative of congressional intent.

> "Of particular salience in this matter is the ease with which the putative intervenors' interpretation could have been expressed, had the drafters

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[7] In the prior appeal, TDCJ and plaintiffs were joined in opposing Brown's and Culberson's attempted appellate intervention by the United States, which has since dropped out of the litigation.

> clearly intended it. This is not an instance of inadvertent ambiguity, nor is it the case of a complex statute that resists interpretation. Neither the standing provision, nor the definitions section, makes any reference to 'individual legislators.' By doing so, it signaled that mere status as a legislator is unavailable. . . . " *Id.*

Thus, the district court determined that Congress' failure to include language explicitly granting intervention to individual legislators foreclosed the possibility that the provision applied to Brown and Culberson.

Two days after entry of the district court's order, Congress amended the PLRA to include the very words the district court had found lacking. *See* Public Law 105-119, 111 Stat. 2470, Sec. 123(a)(1)(B)(ii)(I), November 26, 1997[8]. The intervention provision now reads, "Any state or local official *including a legislator* or unit of government . . . " 18 U.S.C. § 3626(a)(3)(F) (emphasis added).

Based on the new statutory language, Brown and Culberson moved the district court to reconsider their motion to intervene. Despite the clarified language, the district court ruled that the intervention provision still did not encompass Brown and Culberson.[9] *See Ruiz v. Scott*, Civil No. H-78-987 (S.D. Tex. Jan. 28, 1997). The

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[8] The amendment was apparently made in response to this Court's earlier dicta regarding the intervention provision, and not in response to the district court's order.

[9] Technically, this part of the district court's order is dicta since the court based its holding on the grounds that the intervention provision did not apply in this case, discussed *infra*.

court determined that the "jurisdiction or function" language still requires any legislator seeking to intervene to have the authority to *single-handedly* appropriate funds. The amended language, the court concluded, simply clarified that individual legislators were not excluded *per se*.

We review the district court's interpretation of the PLRA *de novo*. *See Spacek v. Maritime Assn.*, 134 F.3d 283, 288 (5th Cir. 1998).

"In interpreting a statute, our objective is to give effect to the intent of Congress. As always, we begin with the language of the statute itself." *Stiles v. GTE Southwest Incorporated*, 128 F.3d 904, 907 (5th Cir. 1997) (citation omitted).

We conclude that the statute clearly grants individual legislators the right to intervene. As amended, the intervention provision (section 3626(a)(3)(F)) reads:

> "Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief."

It is perfectly clear that "appropriation of funds" requires action of the legislature as a unit or whole. However, it is equally clear that no such "appropriation of funds" can be made without the action of individual

legislators and that each legislator, by virtue of that office, has the right, and it is a part of his or her role as a legislator, to participate in the legislature's taking of that action. The question here, then, can be more generally stated as follows: when a particular species of action can be taken only by a multi-member governmental body as a unit or whole, but the body cannot do so if its members do not participate in the taking of the action and the members, as such, have the right, and it is part of their role as members, to so participate, can it fairly be said that a reference to officials or governmental units whose "jurisdiction or function" includes (*inter alia*) the taking of such particular action encompasses only the bodies themselves to the exclusion of their individual members? The answer, it seems to us, will depend on the context in which the reference is made. Absent any contrary contextual indication, the most natural reading of such a reference is that solely the body itself is intended. But a slight change in context may point to a broader intended reference which encompasses not only the body itself but also its individual members. For example, although the decision of cases before the Supreme Court is clearly made only by the Court itself, nevertheless it is perfectly natural and reasonable to speak of the jurisdiction or function of a Justice of the Supreme Court as including deciding cases that come before the Court. The context here compels a similar reading as to the "jurisdiction or function" of "a legislator."

The position of "a legislator" is one which in essence exists and has a jurisdiction and function *only* as a member of a legislative body or a given branch thereof, and hence the statutory words "including a legislator" plainly

indicate that for purposes of determining what is within the "jurisdiction or function" of "a legislator" it is proper to consider what is included within the jurisdiction or function of the legislature itself. Moreover, to come within section 3626(a)(3)(F) the putative intervenor must have a "jurisdiction or function" which "includes" *either* "the appropriation of funds" for prisons *or* "the prosecution or custody" of persons who may be released from or not admitted to a prison as a result of the order in question. However, the jurisdiction or function of a legislator (or the legislature) plainly does *not* include the "prosecution or custody" of criminally accused or convicted persons. Hence, to hold that the jurisdiction or function of "a legislator" also does not include "the appropriation of funds" for prisons (although the jurisdiction or function of the legislature itself plainly does include that) is to render totally without meaning or significance the statutory words "including a legislator." Such a construction is contrary to the canon that "[e]very word used in a statute is presumed to have a meaning, and, if possible, every word must be accorded significance and effect." *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). *See also Crist v. Crist*, 632 F.2d 1226, 1233 n.11 (5th Cir. 1980) (courts must "give effect, whenever possible to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous"). This canon has special force as to the words "including a legislator" because they were added to the statute by amendment and we presume "that when Congress

amends a law the amendment is made to effect some purpose." *Argosy Limited* at 20.[10]

Were we not convinced by the statute's plain language, even a cursory glance at the amendment's history

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[10] We note that appellants have also argued that section 3626(a)(3)(F) may be construed so that its "whose jurisdiction or function includes" limiting language applies only to "unit of government" and not to "[a]ny State or local official including a legislator." While such a construction has the virtue of honoring Congress' plain 1997 intent to include "a legislator" among the class of those to whom section 3626(a)(3)(F) grants the right to intervene, it is not necessary for that purpose, as the construction we adopt in the text likewise does so. And, there are at least two reasons for preferring the construction we adopt. To begin with, it is and has always been unambiguously obvious that a legislator is included within the class of persons described *only* by the words "any State or local official," and accordingly such a construction would cause "including a legislator" to be "redundant and superfluous" contrary to *Crist* and is also militated against by the understanding that " '[t]he word "includes" is usually a term of enlargement. . . . " *Argosy Limited* at 20. This rationale is particularly applicable since the words "including a legislator" were added by amendment and we presume "the amendment is made to effect some purpose." *Argosy Limited*. Here, the obvious purpose was to clarify what was previously doubtful, namely whether it was proper to ascribe for purposes of section 3626(a)(3)(F) a "jurisdiction or function" of a particular multi-member unit of government – the legislature – to its constituent members, the individual legislators. In the second place, a construction that divorces the "whose jurisdiction or function includes" limitation from the "any State or local official" category leads to the absurd conclusion that Congress intended to grant the right to intervene to *any* local official whatever, for example a public weigher, regardless of the total lack of any possible potential effect on that official's duties or function of any order respecting a prison or prisons.

would demand this interpretation. The timing of the 1997 amendment, the House Conference Report, and public commentary confirm Congress' unambiguous intent: that the intervention provision applies to individual legislators.

It appears that Congress amended the PLRA largely in response to language in this Court's August 6, 1997, opinion "doubting" that Brown and Culberson satisfied the statutory intervention provision. *See, e.g.*, Kathy Walt, *Judge rejects bid to end U.S. prison control*, THE HOUSTON CHRONICLE, Nov. 25, 1997 ("U.S. House Majority Whip Rep. Tom DeLay, R-Sugar Land, quietly slipped that wording into the bill, primarily as a result of the 5th Circuit ruling and at Culberson's and Brown's behest"). The amendment's sponsor issued a press release calling that congressional intent to this Court's attention: "I wanted . . . the judges on the Fifth Circuit to know, despite their misinterpretation of Congress' original intent, legislators were meant to have the right to intervene in prison lawsuits, and now that right is explicit. . . . The amendments I sponsored . . . [make] it absolutely clear that Judge Justice must immediately end his unjustifiable blockade of the lawsuit filed in May, 1996 by . . . Buster Brown and . . . John Culberson." *Presidential Signature Should End William Wayne Justice's "Reign of Error,"* Press Release from the office of Congressman Tom DeLay, November 20, 1997.

The press widely reported that Congress amended the PLRA in response to this Court's expression of doubt that the provision applied to individual legislators. *See, e.g.*, Kathy Walt, *supra; DeLay Amendment Limits Prison Consent Decrees, The Bulletin's Frontrunner*, November 25,

1997 (no author); Michelle Mittelstadt, *Seeking to terminate a federal judge's . . .*, 11/20/97 Associated Press Pol Serv., 1997 WL 2563977 ("DeLay's actions are intended to help two Republican state lawmakers who sought unsuccessfully to intervene in the lawsuit.").

Finally, the House Conference Report explicitly states Congress' intent to grant the right to intervene to individual legislators. *See* H.R. Conf. Rep. 105-405 No. 405, 105th Cong., 1st Sess. 1997, 1997 WL 712946 (Leg. Hist.) (characterizing amendments as "technical and limited [changes] . . . to make clear that 'state or local official' includes individual state legislators . . . with regard to who is entitled to intervene as a right. . . . ").[11]

Beyond doubt, the November 1997 amendment to the PLRA grants an unconditional right to intervene to individual legislators.

We recognize that granting individual legislators the right to intervene raises constitutional questions – questions which we subsequently address on the merits in part II of this opinion – and that "[a] court must not

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[11] The Report states: "The changes include replacing the word 'permits' with 'requires' to make clear that 'state or local official' includes individual state legislators. . . . " *See id.* The words "permits" and "requires" refer to section 3626(a)(1)(B)(i), which was also amended by the same 1997 legislation. Pub.L. 105-119, § 123(a)(1)(A), 111 Stat. 2470. The referenced amendment to section 3626(a)(3)(F) appears in Pub. L. 105-119, § 123(a)(1)(B)(ii)(I), 111 Stat. 2470. Section 3626(a)(3)(F) was also then amended in one other respect, namely to correct an obvious wording error by substituting "prison" for "program" so that what had been "program facilities" now reads "prison facilities"; Pub.L. 105-119, § 123(a)(1)(B)(ii)(II), 111 Stat., 2470.

interpret a statute in a way that raises constitutional questions if a reasonable alternative construction poses no such problems." *In re Clay*, 35 F.3d 190, 196 (5th Cir. 1994). "But statutory construction may not be pressed ' "to the point of disingenuous evasion" ' [citations], and in avoiding constitutional questions the Court may not embrace a construction that 'is plainly contrary to the intent of Congress.' [citation]." *Communications Workers of America v. Beck*, 108 S.Ct. 2641, 2657 (1988). Here we conclude that the intent of Congress is plain that individual state legislators are among those to whom section 3626(a)(3)(F) grants the right to intervene where the legislative jurisdiction or function includes appropriation of funds for the construction, operation, or maintenance of prison facilities subject to the challenged prisoner release order, the termination of which the putative intervenors also seek. Here, it is evident to us that the contrary conclusion would amount to disingenuous evasion.

B. Prisoner Release Order

Next, we must determine whether this case falls within the class of cases to which the intervention provision applies. Again, our review is *de novo*. *See Spacek v. Maritime Assn.*, 134 F.3d 283, 288 (5th Cir. 1998).

Section 3626(a)(3)(F) refers to "a prisoner release order" and then states that the described officials or governmental units "shall have standing to oppose the imposition or continuation of such relief, and shall have the right to intervene in *any proceeding relating to such relief.*" *Id.* (emphasis added). Appellees argue that this provision applies only to cases involving prisoner release

orders, and correspondingly, that this case does not involve a prisoner release order. We find that the Final Judgment is indeed a prisoner release order, and therefore that this case falls within the class of cases to which section 3626(a)(3)(F) applies. We do not reach the question whether the intervention provision applies to litigation not involving prisoner release orders.

C. Order vs. Consent Decree

Under the PLRA, "the term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison [.]" Section 3626(g)(4). The district court held that the Final Judgment is not a prisoner release order (PRO). We resolve first whether a consent decree should be considered an "order" under the PLRA and, if so, then whether the Final Judgment meets the statutory definition of PRO.

We begin by noting that section 3626(g)(4) states that a PRO *"includes any order"* (emphasis added) having a certain purpose or effect or which directs certain things. Plainly, if the purpose, effect, or direction requirement is met, there is no other restriction on the type of "order" – "any" order is "include[d]." This indicates an intention that "order" as used in section 3626(g)(4) is to be read in a broad and widely encompassing sense. We also observe that the Final Judgment constitutes or includes what would normally be considered or described as an order or orders of the court. The Final Judgment exists and has

force and effect only by virtue of the district court's December 1992 "Order Approving Proposed Judgment," which states, *inter alia*, that it is "ORDERED . . . that the proposed final judgment . . . shall be implemented forthwith in all respects." The Final Judgment itself states that its various subparts contain "a condensed statement of the specific injunctive relief *ordered* henceforth" (emphasis added), and its various provisions repeatedly state that "Defendants *shall*" do this or that or "Defendants *shall* not" do something (emphasis added). The district court's memorandum opinion approving the Final Judgment notes that it outlines "the continuing relief *ordered*" thereby (emphasis added) and states that approval thereof is proper in part because "this case is at a point at which a comprehensive final *order* is both logical and appropriate" (emphasis added). In a May 31, 1996, order in this case, the district court characterized the Final Judgment as containing "continuing permanent injunctive *orders*" (emphasis added) and also stated that "the Final Judgment entered permanent injunctions." Indeed, it is plain and not disputed by anyone that the Final Judgment is or contains an injunction or injunctions. *Black's Law Dictionary* (6th ed. 1991) defines injunction as "A court order prohibiting someone from doing some specified act or commanding someone. . . . " *Id.* at 784 (emphasis added). In sum, it cannot be doubted that in both ordinary and legal parlance the Final Judgment is or contains an order or orders.

Moreover, it is undisputed that the district court's December 1992 "Order" expressly "approved" the Final Judgment. The PLRA in section 3626(b)(1) expressly uses the term "ordered" to encompass the terms "granted or

approved"; and in that sentence "approved" necessarily refers to consent decrees and is there used synonymously with "ordered."[12]

The district court, however, concluded that the Final Judgment was not an "order" within the meaning of section 3626(g)(4) because it was a consent decree, relying on *Local No. 93, Int'l Assoc. of Firefighters, AFL-CIO v. City of Cleveland et al.*, 106 S.Ct. 3063 (1986). We disagree.

The Final Judgment is a consent decree. *Black's Law Dictionary* defines *consent decree* as "[a] judgment entered by consent of the parties. . . . " *Id.* at 284. This definition reveals consent decrees' "hybrid nature" between judgment and contract. *See Firefighters*, 106 S.Ct. at 3073-74. *See also United States v. ITT Continental Baking Co.*, 95 S.Ct. 926, 934 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees. . . . "), *citing United States v. Swift & Co.*, 52 S.Ct. 460 (1932). "The entry of a consent decree is more than a matter of agreement among litigants. It is a 'judicial act.' " *Lulac v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993), *citing United States v. Swift & Co.*, 52 S.Ct. 460, 462 (1932). Because consent decrees contain elements both of contracts and judicial orders, this Court must decide "whether, given their

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[12] "**(1) Termination of prospective relief. – (A)** In any civil action with respect to prison conditions in which prospective relief is *ordered*, such relief shall be terminable upon the motion of any party or intervenor –

(i) 2 years after the date the court *granted or approved* the prospective relief. . . . " § 3626(1)(b) (emphasis added).

hybrid nature, consent decrees implicate the concerns embodied in [the PLRA] in such a way as to require treating them as 'orders' within the meaning of that provision." *See Firefighters*, 106 S.Ct. at 3073-74.

The Supreme Court distinguished between judgments and consent decrees for purposes of section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), in *Firefighters*. There, minority firemen sued the City of Cleveland under Title VII, a union representing city firemen intervened, and subsequently the plaintiffs and the defendant city agreed to a consent decree over the union's objections that the decree provided for special minority promotion opportunities without requiring each beneficiary to demonstrate he had been a victim of discrimination. The union claimed that was contrary to the last sentence of section 706(g).[13] Before the Supreme Court was the union's

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[13] Section 706(g) of Title VII deals with the relief to be ordered in Title VII lawsuits brought by the EEOC and/or by one or more aggrieved persons. As it existed at the time of *Firefighters*, section 706(g) consisted of the following single paragraph – the last sentence of which was at issue there – viz:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than

appeal of the consent decree judgment on that basis (neither the plaintiffs nor the city challenged the decree). The Court assumed, *arguendo*, that section 706(g) would have precluded the relief granted by the district court had it been ordered on the basis of a contested case rather than as a consent decree. The Court held, however, that section 706(g) did not of itself restrict the relief which could be provided for in a consent decree.[14]

> two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. *No order of the court shall require* the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)." Pub.L. 92-261, § 4, 86 Stat. 103, 1972 *U.S. Code Cong. and Adm. News* 122 at 127-128 (emphasis added).

[14] The Court also held that the decree, agreed to by plaintiffs and the defendant city, was not stripped of its status as a consent decree or rendered invalid merely by reason of the intervenor union's not having agreed to it, because "the consent decree entered does not bind . . . [the union] to do or not to do anything," "imposes no legal duties or obligations on the Union at all," and "does not purport to resolve any claims the Union might have under the Fourteenth Amendment, . . . under § 703 of Title VII . . . or as a matter of contract." *Id.* at 3079. "Indeed, despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims. Whether it is

We note to begin with that *Firefighters* clearly cannot be read to stand for any categorical or across-the-board proposition that consent decrees must for all purposes, or in respect to all statutory references to court orders or judgments, always be treated differently from judgments or orders entered as the result of contested litigation. To the contrary, that opinion states:

> " . . . as we have previously recognized, consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes. [citation] The question is not whether we can label a consent decree as a 'contract' or a 'judgment,' for we can do both. The question is whether, given their hybrid nature, consent decrees implicate the concerns embodied in § 706(g) in such a way as to require treating them as 'orders' within the meaning of that provision.
>
> Because this Court's cases do not treat consent decrees as judicial decrees in all respects and for all purposes, we think that the language of § 706(g) does not so clearly include consent decrees as to preclude resort to the voluminous legislative history of Title VII. The issue is whether, when Congress used the phrase '[n]o order of the court shall require' in § 706(g), it unmistakably intended to refer to *consent decrees*. . . . We turn therefore to the legislative

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now too late to raise such claims, or – if not – whether the Union's claims have merit are questions that must be presented in the first instance to the District Court, which has retained jurisdiction to hear such challenges." *Id.*

> history, since the language of § 706(g) does not clearly settle the matter." *Id.* at 3073-74.

In reviewing the legislative history, the Court observed that its holding in *Steelworkers v. Weber*, 99 S.Ct. 2721 (1979), that Title VII did not forbid reasonable private agreements seeking to eradicate race discrimination by affording racial preferences to individuals who had not been victims of discrimination "was largely based upon the legislative history" of Title VII. *Id.* at 3074. In the same vein, "[t]he legislative history pertaining specifically to § 706(g) suggests . . . in fact, that a principal purpose of the last sentence of § 706(g) was to protect managerial prerogatives of employers and unions." *Id.* The Court went on to stress that "[t]here is no indication in the legislative history that the availability of judicial enforcement of an obligation, rather than the creation of the obligation itself, was the focus of congressional concern" and that judicial enforceability of a consent decree by contempt "does not implicate Congress' concern that the federal courts not impose unwanted obligations on employers and unions any more than the decision to institute race-conscious affirmative action in the first place;. . . . " *Id.* at 3076.

The exact opposite is true with respect to the PLRA. The PLRA analog to section 706(g) of Title VII is section 3626(a)(1)(A), which, like section 706(g), sets forth limitations on relief – "[p]rospective relief" in the case of section 3626(a)(1)(A) – which a court may afford.[15] It is clear

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[15] Section 3626(a)(1)(A) provides in relevant part:

> "**(1) Prospective relief. – (A)** Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the

beyond dispute that in the case of the PLRA – *unlike* section 706(g) – those limitations are expressly made as fully applicable to consent decrees as to judgments entered consequent on adversarial litigation and without agreement. Thus, section 3626(a)(1)(A) expressly limits not only the "prospective relief" which a court may "grant," but, *unlike* section 706(g), *also* that which it may "approve."[16] Similarly, "prospective relief" is defined so that it expressly "includes consent decrees." See section 3626(g)(7) & (9).[17] If there were any doubt about the

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violation of the Federal right of a particular plaintiff or plaintiffs. *The court shall not grant or approve* any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." (Emphasis added).

[16] Likewise, the parallel right to terminate prospective relief not meeting the section 3626(a)(1)(A) standard is applicable to relief "*approved* or granted." Section 3626(b)(2) (emphasis added).

[17] These sections provide:

"(7) the term 'prospective relief' means *all* relief other than compensatory monetary damages;

. . . .

(9) the term 'relief' means *all* relief in *any form* that may be granted *or approved* by the court, and *includes consent decrees* but does not include private settlement agreements." (Emphasis added).

Other relevant definitions in section 3626(g) include the following:

"(1) the term 'consent decree' means *any* relief entered by the court that is based in whole or in part

matter, it is completely removed by section 3626(c)(1) & (2)(A), *viz*:

> "**(1) Consent decrees.** – In any civil action with respect to prison conditions, *the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).*
>
> **(2) Private settlement agreements. – (A)** Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), *if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding* that the agreement settled." (Emphasis added).

In sum, it is wholly obvious that, unlike section 706(g) of Title VII, the PLRA *does expressly* restrict the prospective relief which may be afforded by a consent decree to the same extent and in the same manner as it restricts the prospective relief which may be afforded by a judgment entered pursuant to adversarial litigation without agreement. Moreover, unlike Title VII, which does not mention consent decrees, the PLRA *does* expressly reflect Congress' concern to limit judicial enforcement of obligations that arise out of the agreement

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> upon the consent or acquiescence of the parties but *does not include private settlements;*
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> . . . .
>
> (6) the term 'private settlement agreement' means an agreement entered into among the parties that is *not subject to judicial enforcement other than the reinstatement of the civil proceeding* that the agreement settled;" (Emphasis added).

of the parties embodied in a consent decree and specifically reflects the intention to distinguish between private settlement agreements which are subject to court enforcement and those which are not (except by reinstatement of the thereby settled proceedings). And, contrary to the situation in respect to Title VII and its section 706(g), the legislative history of the PLRA is entirely consistent with and supportive of the intention to thus limit the relief which can be afforded by a consent decree. As the Fourth Circuit said in *Plyler v. Moore*, 100 F.3d 365, 370 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 2460 (1997), citing the PLRA's legislative history, "Congress's purpose in enacting the PLRA was 'to relieve states of the onerous burden of complying with consent decrees that often reach far beyond the dictates of federal law'."[18]

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[18] *See, e.g.*, H.R.Rep. No. 21, 104th Congress 1st Sess. (1995), which notes that the then proposed section 3626:

> " . . . addresses the problem of federal court-imposed prison population caps by limiting the remedies that can be granted or enforced by a court in a prison conditions suit alleging a violation of a federal right. Courts hearing such suits have often approved and enforced *consent decrees* giving expansive relief to the complaining inmates. While both state courts and federal courts have in some instances entered these unnecessarily broad consent decrees, it is the *federal courts* that, often with seemingly good intentions, *used these consent decrees to intrude into a state criminal justice system* and seriously undermine the ability of the local justice system to dispense any true justice.
>
> Population caps are a primary cause of 'revolving door justice.' The statistics alone do not reflect the incalculable losses to local communities caused by criminals confident in their belief that the criminal

To hold that the Final Judgment, because it is a consent decree, is therefore not an "order" and hence cannot be a "prisoner release order," not only flies in the face of both the language of the PLRA and the manifest intent of Congress, but likewise wrenches *Firefighters* out of context and stands it on its head.

D. "Prisoner Release" Order

Next, the district court determined that even if the Final Judgment is an order, it does not meet the PLRA's definition of "prisoner release" order. The PLRA states that prisoner release order "includes *any* order, *including a temporary restraining order or preliminary injunctive relief,* that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4) (emphasis added).[19] The court reasoned that because the State of Texas is free to build more prisons, the Final Judgment only regulates prison density and not prison population. Therefore, the court held that the Final

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justice system is powerless to stop them. In Philadelphia, over 100 persons have been murdered by criminals set free by the prison population cap." *Id.* at 11 (emphasis added).

This also reflects that a consent decree may be a prisoner release order.

[19] Section 3626(g)(5) provides:

"**(5)** the term 'prison' means any Federal, State, or local *facility* that incarcerates or detains juveniles or adults accused of, convicted of, sentenced of, or adjudicated delinquent for, violations of criminal law;" (emphasis added).

Judgment was not a prisoner release order under 18 U.S.C. § 3626(g)(4). Again, we disagree.

The Final Judgment contains population caps on the number of prisoners allowed to be housed in specified groups of Texas prison units. ("At the time of this Final Judgment, the maximum system population of existing units, including [named units], and 20 trusty camps, is 51,067. . . . "). Eleven individual prison units are subject to specific population limits. ("Except as permitted by paragraph XIII.D.2 or Exhibit B, defendants shall not permit the population of the following individual units to exceed: Darrington 1610[;] Ferguson 2100[;] Wynne 2300[;] Beto I 3150[;] Clemens 894[;] Coffield 3150[;] Eastham 2153[;] Ellis I 1995[;] Ramsey II 893[;] Retrieve 809[;] Huntsville 1705."). The Final Judgment mandates reducing these limits if any existing housing portions thereof are ever closed or converted to some other use. ("The maximum population of any unit, and the maximum system population, shall be reduced if any facility, including cellblocks, dormitories, or any portion thereof is, for any reason, closed or converted to any use other than the housing of prisoners."). Clearly these specific population limits and regulations have the "purpose or effect of reducing or limiting the prison population" and in substance "direct the . . . non-admission of prisoners to a prison." *See* 18 U.S.C. § 3626(g)(4). *See also Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (holding that twenty-person cap on probation detainees in one particular prison was a prisoner release order). The fact that the State of Texas is free to build more prisons does not alter the fact that the Final Judgment "limits" the prison population.

In fact, the provisions of the Final Judgment governing the construction of new facilities closely limit and regulate the population within such facilities as well. ("Defendants shall not permit TDCJ-ID's total prisoner population to exceed the maximum system population established by paragraph XIII.B.1, as adjusted pursuant to paragraph XIII.B.4 and by the addition of the maximum population of facilities added pursuant to the terms of this paragraph XIII.D."); ("Defendants may increase unit and system population by constructing permanent additions to or renovating portions of future units and existing units other than [named units]. No addition or renovation that is not substantially self-contained like trusty camp shall be undertaken if its operation would impair the provision of the services, facilities, and conditions to the prisoners assigned to the unit to which the addition or renovation is added.").

The district court was apparently of the view that an order is not a prisoner release order even though it has the purpose or effect of limiting the number of persons that may be held as prisoners in a then presently existing particular incarceration facility, or even in *all* of the then presently existing incarceration facilities of the jurisdiction in question, so long as more prisoners can be incarcerated *in the future* in facilities constructed or enlarged *after* the effective date of the order and the order does not contain an absolute numerical limit on the number of prisoners that can, in the future, be incarcerated in the jurisdiction *regardless* of the capacity or characteristics of prison facilities which may subsequently be created. In our view, such a construction is entirely unwarranted. To begin with, it is highly unlikely that there has *ever* been a

court order limiting the number of prisoners that may be incarcerated *regardless* of the capacity or characteristics of the relevant prison or prisons,[20] so the district court's construction would as a practical matter render the PLRA's provisions respecting prisoner release orders a meaningless exercise in futility.

Moreover, the effect of the Final Judgment *is* to limit the total number of prisoners incarcerated in the Texas prison system to 51,067, at least unless and until additional incarceration facilities are constructed. Although that limitation may not prove permanent (because the order does not wholly prohibit construction and use of new facilities), the fact that the limitation is not permanent does not mean it is not a limitation. There is nothing in section 3626(g)(4), defining prisoner release orders, which suggests that that term is restricted to orders having the effect of *permanently* – as opposed to temporarily or conditionally – "limiting the prison population." Indeed, the language of section 3626(g)(4) clearly reflects that temporary limits are included, for section 3626(g)(4) specifically embraces "a temporary restraining order or preliminary injunctive relief." The Final Judgment also expressly limits the population of various particular prisons. "[T]he prison population" as used in section 3626(g)(4) is not restricted to the entire prison system of a jurisdiction, but also includes individual prisons, which is reflected by the definition of "prison" as "*any* Federal, State, or local *facility* that incarcerates" (see note 19,

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[20] Nor are we aware of any constitutional provisions or laws or court decisions which might even arguably tend to give rise to the issuance of such an order.

supra) and by the fact that section 3626(g)(4) includes orders directing "non-admission of prisoners to a prison" (emphasis added), which a population limit on a given prison plainly does. *Tyler v. Murphy, supra.*

The Final Judgment is clearly a prisoner release order within the meaning of 18 U.S.C. § 3626(g)(4).

Because we find that the PLRA as amended grants intervention as of right to individual legislators, and the Final Judgment here at issue is a prisoner release order, we hold that the intervention provision of the PLRA, section 3626(a)(3)(F), applies to this case.

E. Timeliness

Now we examine whether Brown and Culberson's motion to intervene was timely. *See* Fed. R. Civ. P. 24(a) ("*Upon timely application,* anyone shall be permitted to intervene in an action (1) when a statute of the United States confers an unconditional right to intervene. . . . ") (emphasis added). Denials of intervention as of right are generally reviewed *de novo. See Edwards v. City of Houston,* 78 F.3d 983, 985 (5th Cir. 1996). To the extent that the determination is based on a finding of untimeliness, however, this Court reviews for abuse of discretion. *Id.* at 1000.

In *Sierra Club v. Espy,* 18 F.3d 1202 (5th Cir. 1994), this Court set forth four factors by which to evaluate the timeliness of an intervention motion. They are: (1) the length of time applicants knew or should have known of their interest in the case; (2) prejudice to existing parties caused by applicants' delay; (3) prejudice to applicants if

their motion is denied; and (4) any unusual circumstances. *Id.* at 1205.

Based on these factors, the district court determined that Brown and Culberson's intervention motion was untimely. However, because the district court held that section 3626(a)(3)(F) did not apply to Brown and Culberson, the court's timeliness determination was based on factors relevant to Rule 24(a)(2). The district court determined that appellants' alleged interest in this case should have been discovered long ago. This case began in the 1970s, and other legislators testified at that time. Moreover, the consent decree was entered in 1992, at which time both appellants were members of the legislature. However, appellants did not raise any objections to the consent decree until their motion to intervene, three-and-a-half years later. Furthermore, the district court determined that allowing appellants to intervene now would prejudice the existing parties as it "would amount to a relitigation of the original entry of a delicately-crafted consent decree." While the district court's analysis arguably may have provided an acceptable framework to deny appellants' motions to intervene under Fed. R. Civ. P 24(a)(2) ("interest intervention") or Fed. R. Civ. P. 24(b) (permissive intervention), it cannot sustain the denial of Rule 24(a)(1) statutory intervention in light of the PLRA.[21]

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[21] Because we hold that appellants were entitled to intervene under Rule 24(a)(1), we need not determine whether the district court erred in denying appellants' motion to intervene under Rule 24(a)(2) and Rule 24(b)(2).

The first factor this Court should examine in evaluating the timeliness of an intervention motion is "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene. . . . " *Sierra Club* at 1205. The timeliness of Brown and Culberson's motion under section 3626(a)(3)(F) must be determined by reference to the passage of the PLRA on April 26, 1996, and its November 1997 amendment. Brown and Culberson initially moved to intervene in May 1996, less than one month after the PLRA provided any statutory right to intervene; and, within a few days after the November 1997 PLRA amendment which added "including a legislator" to section 3626(a)(3)(F), appellants on the basis thereof moved for reconsideration of the order denying their motion to intervene. Clearly, these motions meet any standard of timeliness approved by this Court. *See, e.g., Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (finding thirty-seven and forty-seven-day delays not unreasonable); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977).

Second, the "prejudice to existing parties" prong of the *Sierra Club* test measures prejudice caused by the intervenors' delay – not by the intervention itself. *See Sierra Club* at 1205 ("(2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case"). As we have already concluded that Brown and Culberson did not delay in seeking intervention under section 3626(a)(3)(F), it is plain that Brown and Culberson did not prejudice the existing parties by

delay. Finally, we note that the PLRA's intervention provision explicitly authorizes various officials and units of government to oppose the *continuation* of *preexisting* prospective relief, exactly like that in the present case. To now declare Brown and Culberson's motion untimely precisely because this litigation has persisted for decades would frustrate the very purpose of the intervention grant. Surely, this qualifies as an "unusual circumstance" militating in favor of finding timeliness. *See Sierra Club* at 1205. For these reasons, we hold that Brown and Culberson timely moved to intervene in this case under the PLRA.

Intervention under Rule 24(a)(1) is "absolute and unconditional." *See Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co. et al.*, 67 S.Ct. 1387, 1393. (1947). Rule 24(a)(1) "statutory intervenors" need not show inadequacy of representation or that their interests may be impaired if not allowed to intervene. *Cf.* Fed. R. Civ. P. 24(a)(2) (absent statutory grant, intervention as of right requires showing of timeliness, interest in the subject matter of the transaction, threat that interest may be impaired if not permitted to intervene, and inadequacy of representation by existing parties). Under Rule 24(a)(1), intervenors need not even prove a "sufficient" interest relating to the subject matter of the controversy, since Congress has already declared that interest sufficient by granting the statutory right to intervene. Indeed, "[o]nce it is clear that [the statute applies], there is no room for the operation of a court's discretion." *See Brotherhood of Railroad Trainmen*, 67 S.Ct. at 1393. Consequently, we hold that Brown and Culberson should have been permitted to intervene under the PLRA.

II. Constitutionality of the PLRA'S "including a legislator" Intervention Provision

Having determined that 18 U.S.C. § 3626(a)(3)(F) grants Brown and Culberson an unconditional right to intervene in this case, we turn to the final question of whether that statutory provision is constitutional. Appellees argue that granting individual legislators the right to intervene under the PLRA would violate Article III of the Constitution because Article III requires intervenors to have standing, which they argue Brown and Culberson lack.

Article III, § 2 limits federal courts' jurisdiction to "cases" and "controversies." *See* U.S. CONST. art. III, § 2; *See also, e.g., Raines v. Byrd,* 117 S.Ct. 2312, 2317 (1997) ("Under Article III, § 2 of the Constitution, the federal courts have jurisdiction over this dispute . . . only if it is a 'case' or 'controversy.' "). The case-or-controversy requirement "ensures the presence of the 'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Diamond v. Charles,* 106 S.Ct. 1697, 1703 (1986), *citing Baker v. Carr,* 204, 82 S.Ct. 691, 703 (1962).

Standing is a judicially-developed doctrine designed to ensure an Article III court is presented by parties before it with an actual case or controversy.[22] *See, e.g.,*

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[22] The standing doctrine has two components, the first imposing constitutional limitations on federal courts' jurisdiction, *discussed infra,* and the second imposing prudential limitations on the exercise of that jurisdiction. *See, e.g., Warth v.*

Raines, 117 S.Ct. at 2317 ("One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue.") (citation omitted); *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992) ("[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III," *citing Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984)).

To establish standing, a party must allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984). That injury must be " 'distinct and palpable' . . . and not 'abstract' or 'conjectural' or 'hypothetical. . . . ' " *Id.* (internal citations omitted). This injury requirement ensures that courts will decide only actual disputes and not abstract policy questions more properly decided by coordinate branches of government. *See, e.g., Allen v. Wright*, 104 S.Ct. 3315, 3325 (1984) ("[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers.") (internal citations omitted). *See also id.*, ("[Questions relevant to] the standing inquiry

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Seldin, 95 S.Ct. 2197, 2210 (1975). Prudential standing limitations help courts identify proper questions for judicial adjudication, and further define the judiciary's role in the separation of powers. *See id.* However, where, as here, Congress has authorized a party's intervention into a case, prudential standing considerations are significantly lessened. *Cf. Raines v. Byrd*, 117 S.Ct. 2312, 2318 n.3 (1997) (noting that Congress' authorization of plaintiffs to challenge law's constitutionality eliminated prudential standing considerations and lessened risk of conflict with legislative branch).

must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity', . . . and only when . . . [i]t is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process. . . . ' ") (internal citations omitted). Moreover, "standing also reflects a due regard for the autonomy of those likely to be affected by a judicial decision." *Diamond,* at 1703. Additionally, standing requires courts to base decisions on a concrete, actual set of facts, so that a court may appropriately limit the precedential value of its decisions. *See Valley Forge Christian College v. Americans United for the Separation of Church and State,* 102 S.Ct. 752, 759 (1982).

It is doubtful that, if Brown and Culberson were the only parties before the court seeking termination of (or other relief respecting) the Final Judgment, they would have sufficient standing so that the district court would be presented with an Article III case or controversy. *See Raines v. Byrd,* 117 S.Ct. 2312 (1997) (discussing legislative standing).[23] We assume, *arguendo only,* that appellants

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[23] In *Raines v. Byrd,* 117 S.Ct. 2312 (1997), the Supreme Court held that individual Members of Congress lacked standing to challenge the constitutionality of the line-item veto. *Raines,* 117 S.Ct. at 2314. In *Raines,* Members of Congress alleged that the line-item veto diminished their congressional voting power, and therefore caused an "injury" sufficient to create standing. *See id.* at 2315-20. The Court characterized this as an "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *See id.* at 2318. The Court found that the Members had "alleged no injury to themselves as individuals[, and] the institutional injury they allege is wholly

would not have such standing. However, we hold that Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so.

Traditionally, standing was required only of parties seeking to initiate a lawsuit. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 102 S.Ct. 752, 758 (1982) ("[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [show standing]"). In recent years, however, some courts have required intervenors to possess standing as well. *See, e.g., Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *United States v. 39.39 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984). Furthermore, some courts have interpreted language in Diamond to suggest that Article III may require intervenors to possess standing as a matter of constitutional law. *See Diamond*, 106 S.Ct. at 1707 ("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III."). We think that these courts misinterpret *Diamond*, and further offer

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abstract and widely dispersed. . . . " *See id.* at 2322. Therefore, the Court held that "these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." *Id.*

little justification for reading this new requirement into Article III.

In *Diamond*, the Supreme Court held that an intervenor could not pursue an appeal in that Court, in the absence of the party on whose side he had intervened, without independently possessing standing. *Id.* at 1700-03. That case involved a challenge to the constitutionality of an Illinois abortion law. Diamond intervened in the district court to defend the statute, claiming an interest as a pediatrician and as a parent of an unemancipated minor daughter.[24] *Id.* at 1701.

After the Court of Appeals struck down the law, Diamond wished to appeal. Unfortunately, the State of Illinois, on whose side Diamond had intervened, and the only party (other than Diamond) on that side of the case, declined to appeal. *Id.* at 1703. The State's failure to appeal the ruling destroyed the presence of a "case" or "controversy" before the Supreme Court. *Id.* at 1704. "By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute. The State's general interest may be adverse to the interests of appellees, but its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.*

Therefore, in order for Diamond to have appealed the decision, he himself would have needed to satisfy Article

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[24] It is unclear whether Diamond intervened under Rule 24(a)(2) intervention as of right, or under Rule 24(b) permissive intervention.

III's jurisdictional case-or-controversy requirement. *Id.* at 1706. Diamond could not do this, because his status as a "doctor, a father, and a protector of the unborn" did not create a sufficient interest in the litigation to establish standing. *Id.* at 1705. Diamond lacked standing; since Diamond was the only party pursuing the appeal, the case-or-controversy requirement was unsatisfied. *Id.* at 1708 ("Because [Diamond] lacks any judicially cognizable interest in the Abortion Law, his appeal is dismissed for want of jurisdiction.").

The language in *Diamond* which has created confusion was written in the context of interpreting the applicable intervention rule. In distinguishing Rule 24(a)(2)'s interest requirement[25] from the standing doctrine's interest requirement, the Supreme Court noted the difficulty with which the Courts of Appeals have differentiated the two "interests."

> "This Court has recognized that certain public concerns may constitute an adequate 'interest' within the meaning of Federal Rule of Civil Procedure 24(a)(2). . . . However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of

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[25] Fed. R. Civ. P. 24(a)(2) requires an intervenor thereunder to have an "interest relating to the property or transaction which is the subject of the action."

> Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now." *Diamond*, at 1707 (internal citations and footnote omitted).

As the Diamond Court noted, the Courts of Appeals disagree whether Rule 24(a)(2) requires that a putative intervenor thereunder possess standing. *See Diamond*, at 1707, n.21, *citing United States v. 39.39 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980); *Sagebush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983); *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861 (8th Cir. 1977). Notably, these cases each struggled with defining Rule 24(a)(2)'s interest requirement, and not Article III's jurisdictional requirements. To be sure, the "interest" required by Rule 24(a)(2) has largely evaded a generally accepted precise definition. *See generally*, 7C Wright, Miller, and Kane, *Federal Practice and Procedure: Civil 2d* § 1908 (2d ed. 1986) at 263 ("There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of the action' that is required for intervention of right."). The *Diamond* Court merely recognized that some courts have equated the Rule's interest requirement with that of standing. *See Diamond* at 1707.

Of the cases cited in *Diamond*, only Kelley maintains that Article III (and not just Rule 24(a)(2) & 24(b)(2)) requires intervenors to possess standing. *See Kelley*, 747 F.2d at 778. Unfortunately, the *Kelley* opinion merely assumes that Article III requires intervenors to possess standing, and offers neither precedent nor reasons to support this assertion.

Recently, a divided panel of the Eighth Circuit joined the *Kelley* court in elevating the requirement that intervenors possess standing to a constitutional, rather than a procedural, mandate. *See, e.g., Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). That panel majority held that the presence of intervenors lacking Article III standing destroyed the court's jurisdiction over the case. *See id.* ("In our view, an Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy"). Judge Wollman disagreed. *Id.* at 1304. The *Mausolf* majority required intervenors to possess standing because intervenors seek to participate in lawsuits and ask courts to decide the merits of their claims. *See Mausolf*, at 1300; *accord, City of Cleveland v. Nuclear Regulatory Commission (NRC)*, 17 F.3d 1515 (D.C. Cir. 1994), *discussing Kelley*, 747 F.2d 777. Also, some courts have required standing because intervenors stand on "equal footing" with the original litigants in an action. *See NRC*, at 1517. *See also People Who Care v. Rockford Board of Education*, 179 F.R.D. 551 (N.D. Ill. 1998) (same); *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 101 F.3d 503, 507 (7th Cir. 1996) ("The threatened injury would give him the minimal standing

required by Article III, which our court requires of any intervenor").

We find the better reasoning in those cases which hold that Article III does not require intervenors to possess standing. *See, e.g., Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991); *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989); *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978). These cases recognize that the Article III standing doctrine serves primarily to guarantee the existence of a "case" or "controversy" appropriate for judicial determination, *see Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984), and hold that Article III does not require each and every party in a case to have such standing. See also, David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 726 (1968) ("Perhaps it should go without saying, but it must be understood that there is a difference between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene.").

In *Chiles*, the Eleventh Circuit held that standing to initiate a lawsuit was not required in order to intervene into a pending suit. *Id.* at 1213. That court noted that the standing requirement exists to ensure that a justiciable case or controversy exists before the court. *Id.* at 1212. Rule 24, authorizing intervention, presumes that a justiciable case or controversy already exists before the court. *See id; See also*, 7C Wright, Miller, and Kane, *Federal Practice and Procedure: Civil 2d* § 1917 (2d ed. 1986) at 457 ("Intervention presupposes the pendency of an action in

a court of competent jurisdiction. . . . ") (footnote omitted). Because a court's subject matter jurisdiction is necessarily established before intervention, the *Chiles* Court held that a party seeking to intervene need not possess standing. *Id.* at 1212-13.[26] *See also Shapiro, supra* ("When one seeks to intervene in an ongoing lawsuit, these basic questions [whether the controversy is ripe for adjudication, whether the proper parties are before the court, and whether the interests are sufficient to invoke jurisdiction] have presumably been resolved.").

The Second, Sixth, and Ninth Circuit Courts of Appeals have reached similar conclusions. *See United States Postal Service v. Brennan,* 579 F.2d 188, 190 (2d Cir. 1978) ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor."); *Associated Builders & Contractors v. Perry,* 16 F.3d 688, 690 (6th Cir. 1994) ("An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an

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[26] The Eleventh Circuit held that while Article III does not require intervenors to have standing, "[t]he standing cases . . . are relevant to help define the type of interest that the intervenor must assert [under Rule 24(a)(2)]." *Chiles,* at 1213. Like the Supreme Court in *Diamond,* we are not today presented with the proper interpretation of Rule 24(a)(2). Our holding is simply that Article III does not require intervenors to have standing as a matter of constitutional law. Whether intervention under Rule 24(a)(2) requires such a showing, we do not today consider. As to Rule 24(a)(2), see generally *New Orleans Public Service v. United Gas Pipe Line,* 732 F.2d 452, 463-466 (5th Cir.), *cert. denied,* 105 S.Ct. 434 (1984).

existing district court suit where the plaintiff has standing", *citing Trbovich v. United Mine Workers*, 92 S.Ct. 630, 635-36 (1972)); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (requiring Article III standing only where intervenor sought to pursue appeal on his own).

Once a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established.[27] *Cf. Wichita R. & Light Co. v. Public Utilities Commission of the State of Kansas*, 43 S.Ct. 51, 54 (1922) ("Jurisdiction once acquired on that ground [diversity of citizenship] is not divested by a subsequent change in the citizenship of the parties. . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is

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[27] Somewhat analogously, the presence of additional claims which could not have been filed in federal court does not necessarily divest a federal court of jurisdiction so long as the Article III requirements remain intact. *See* 28 U.S.C. § 1367. When a federal claim is removed to federal court, the addition of a state-law claim, which would not independently be removable, does not deprive a federal court of jurisdiction so long as "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' " *See United Mine Workers v. Gibbs*, 86 S.Ct. 1130, 1138 (1966). The *Gibbs* holding is now essentially codified at 28 U.S.C. § 1367, ("the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

not essential to a decision of the controversy between the original parties.").

Finally, appellees argue that even if standing is not required of all intervenors, it should be required in this case because Brown and Culberson advance arguments not raised by either party – specifically, that the district court's Final Judgment violates the Tenth Amendment, the Eleventh Amendment, and the Guarantee Clause of the United States Constitution. Appellees argue that Brown and Culberson need standing because they "seek to invoke" the district court's jurisdiction in order to decide the merits of their claims. This use of the term "invoke" is misplaced. The court's jurisdiction in this case has already been invoked by the original parties. At the very least, there has been a case or controversy since TDCJ filed its motion to terminate and plaintiffs their opposition, and there continues to be a case or controversy.

Brown and Culberson seek the same ultimate relief as the TDCJ: the termination of the Final Judgment. They merely seek that relief based in part on different legal theories. This is not a case where the intervenors seek alternative injunctive relief, or to block a proposed settlement. Instead, Brown and Culberson seek only to ask the district court to consider other possible legal grounds for granting the relief TDCJ has already requested. Such a request creates no jurisdictional obstacle for the court. *Cf. United States ex rel Thompson v. Columbia/HCA Health Care Corp.*, 125 F.3d 899 (5th Cir. 1997) (appeals court may uphold judgment on any proper ground, even though ground was not relied upon by the district court). *But see Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir.

1988) (suggesting that standing may be required in part because an intervenor acquires rights which may undermine the original parties' interests). Moreover, as the Court said in *Firefighters*:

> "It has never been supposed that one party -- whether an original party, a party that was joined later, or an intervenor – could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, *while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.*" *Id.*, 106 S.Ct. at 3079 (emphasis added).[28]

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[28] The Court went on to note the obvious:

> "Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.*

Whether (or under what circumstances, if any), *if* TDCJ and plaintiffs completely settled, appellants would have sufficient standing for the district court to continue to be presented with an Article III case or controversy is not an issue before us. Nothing suggests that any settlement is in the offing. We also note that under the PLRA the district court is precluded, *inter alia*, from entering or approving any consent decree, or otherwise ordering or granting any prospective relief, unless the limitations of section 3626(a) are met. See section 3626(c). Nor are we presented with a situation in which the district court has ruled on the motion to terminate, TDCJ does not appeal, and Brown and Culberson attempt to. *See Diamond*.

For the foregoing reasons, we reverse the district court's denial of Brown's and Culberson's motion to intervene and we remand the case with instructions to forthwith grant Brown and Culberson intervention.[29]

REVERSED and REMANDED with instructions

In a letter submission tendered approximately a month after this case was orally argued, plaintiffs (not joined by TDCJ) assert for the first time in this Court that if the PLRA authorizes Brown and Culberson to intervene it violates the Tenth Amendment and the Guarantee Clause because, they argue, it constitutes the federal government's selecting who will speak for the state. But, Brown and Culberson, by their intervention, do not (and they do not purport to) speak for or represent the state or the TDCJ; they speak for and represent only themselves in their respective official positions as individual legislators. The other arguments in this letter are addressed earlier in this footnote and in the text. We also note that section 3626(a)(3)(F) speaks only to intervention which seeks, as does that of appellants, "to oppose the imposition or continuation" of court-ordered relief *against* a state (or one of its entities or subdivisions) or "to terminate" such relief; in other words, section 3626(a)(3)(F) intervention is only to *relieve* a state of court orders which impose restrictions or obligations on it.

[29] We order that the mandate issue forthwith. See Fed. R. App. P. 40, 41. We are informed that the district court has set TDCJ's motion to terminate for hearing January 21, 1999. We further observe that the motion to terminate has not been promptly ruled on as required by section 3626(e)(1).

IN THE UNITED STATES DISTRICT COURT OF
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID RUIZ, et al.,	§	
	§	
Plaintiffs,	§	C.A. H-78-987
	§	
v.	§	
	§	
WAYNE SCOTT, and the	§	
STATE OF TEXAS, et al.,	§	
	§	
Defendants,	§	

SUPPLEMENTAL MOTION AND BRIEF IN SUPPORT OF MOTION OF TEXAS REPRESENTATIVE JOHN CULBERSON AND TEXAS SENATOR J. E. "BUSTER" BROWN TO TERMINATE FEDERAL JURISDICTION OVER THE TEXAS PRISON SYSTEM

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EXPEDITED RULING
REQUESTED

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SUMMARY OF ARGUMENT

Movants file this their Supplemental Motion and Brief in Support of their previously filed Motion to Terminate Federal Jurisdiction in this "proceeding" pursuant to the Constitution and laws of the United States, including the Prison Litigation Reform Act (hereinafter "PLRA"), 18 USC §3626, including (a)(3)(f), which provides, in pertinent part, that:

> "Any State or local official . . . whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program facilities . . . shall have standing to oppose the . . . continuation in effect of [a] prisoner release order, [and] shall have standing [to] seek termination of such relief, and shall have the right to intervene in *ANY* proceeding relating to such relief." (emphasis added).

See **Exhibit 2,** Appendix. Movants are state officials as defined by the PLRA, and are entitled to intervene in this "proceeding" as a matter of right to seek termination of federal jurisdiction over the Texas Prison System.

Furthermore, pursuant to this newly enacted statute, the Prison Litigation Reform Act, Intervenors are entitled to immediate termination of all prospective relief entered by the District Court in the case at bar. In particular, the PLRA provides that:

> "In ANY civil action with respect to prison conditions, an intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief

> is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

As is shown by the official court record and the Appendix herein, the prospective relief entered by the District Court in December, 1992, does not contain these requisite findings. Therefore, as a matter of law, intervenors are entitled to intervene in this appellate "proceeding relating to" this "prisoner release order," and intervenors are further "entitled to the immediate termination" of the district court's orders entered on or about December 11, 1992 and all other prospective relief in this case. Texas Constitution Art. VIII, Section 6; *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. 1972).

The PLRA entitled Movants to intervene, as do the Federal Rules of Civil Procedure, for the sole purpose of terminating the *Ruiz v. Scott* court orders on the basis that perpetual federal jurisdiction over the Texas prison system: (1) invades the core of sovereign authority reserved to the States by the structure of the "compound republic" of America as expressed by the Tenth Amendment to the U.S. Constitution; (2) violates the Guarantee Clause; (3) violates the Eleventh Amendment; (4) violates principles of federalism and comity; (5) exceeds the requirements of the Eight Amendment and thus exceeds the Court's remedial powers, (6) violates the Prison Litigation Reform Act, 18 U.S.C. §3626, and/or (7) is null and void because the 1992 (*Ruiz* settlement agreement was a void contract from its inception because its key terms and effects were materially misrepresented.

ARGUMENT

I. CONGRESSIONAL INTENT IN ENACTING THE PLRA OBLIGATES THE DISTRICT COURT TO FIRST RULE ON INTERVENORS' TENTH AMENDMENT AND GUARANTEE CLAUSE CLAIMS.

Intervenors do hereby move this Honorable Court to invoke its remedial powers, including the Declaratory Judgment Act, or the All Writs Act, or the rules of equity, to immediately terminate all federal court jurisdiction over the Texas prison system in the case at bar. Petitioners have properly intervened in this proceeding, therefore, the intent of the PLRA, the official court record, the Appendix attached hereto, and the substance of Petitioners' Motion to Intervene, Motion to Terminate, Briefs in support thereof, and the Appendix attached hereto, obligates the District Court to immediately terminate the District court orders of December, 1992, and all related court orders which have the purpose or effect of controlling the state prison system on the basis that these court orders violate the Tenth Amendment and the Guarantee Clause of the U.S. Constitution.

As Texas Legislators, Movants are vested with whatever residual, autonomous sovereign authority passed from the Congress of the Republic of Texas to the Texas Legislature at the moment of the creation of the State of Texas at midnight on December 29, 1845. The PLRA, as shown by the Congressional Record and the Committee Report, is intended to operate as a congressionally defined outer limit on the remedial power of the federal courts to usurp the governmental function of legislators such as Movants, and to restrict the Courts' ability to

invade the residual autonomous authority of the States to operate state and local prison systems. *See* **Exhibit 2,** Appendix. "The historic police powers of the states cannot be displaced by a federal statute unless that was the clear and manifest purpose of Congress," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, (1963) [cited with approval in *U.S. v. Lopez,* 115 S.Ct. 1624, 1640 (1995)]. In the PLRA, Congress has instructed the Federal Courts to enforce the Act by restoring the historic police powers of the States. It is evident from the location of the PLRA in Title 18 of the U.S. Code, from the express terms of the statute, and from the intent of Congress as expressed in the Committee Report and floor debates, that the PLRA constitutes the exclusive set of procedures and remedies now available to prisoners who file suit in federal court seeking a federal remedy for an alleged violation of the prisoner's individual federal rights. It is also very significant that this codification has eliminated the availability of class action suits such as the one which created the case at bar. As the Committee Report states, "Congress has acted well within its authority in specifying procedure in this provision. . . . " Committee Report p. 27, n. 7, *see* **Exhibit 2.** "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts" *Hanna v. Plummer,* 380 U.S. 471 (1965). *See also Mistretta v. U.S.,* 488 U.S. 361 (1989) ("Congress has undoubted power to regulate the practice and procedure of federal courts"). Congress has clearly designed the PLRA to protect the Tenth Amendment powers of the sovereign states, to enforce the Guarantee Clause, and to

preserve key structural elements of the U.S. Constitution, such as separation of powers, judicial review and federalism. See *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996), Cert. denied, 65 U.S.L.W. 3825 (U.S. June 14, 1997) No. 96-8596. As evidence that Congress intends for the federal courts to use the PLRA to protect the autonomous sovereign authority of the states to control state and local prison systems, Movants would direct the Court's attention to the *Plyler* decision, and *Gavin v. Branstad*, NO. 96-3746 (8th Cir. August 5, 1997) and to page 23 of Congress' Committee Report, *see* **Exhibit 2,** Appendix. The Committee Report's explanation of congressional intent points out that the PLRA "codifies existing law concerning a defendant's constitutional rights," and that "codification of existing law serves to rein in lower courts whose wayward actions cannot all be reviewed by the Supreme Court, but which are causing enormous harm to the public." *See U.S. v. Lopez*, 115 S.Ct. 1624, 1637, 1638 (1995). Petitioner's Motion, coupled with Congress' intent to enacting the PLRA and granting standing to legislators whose core, sovereign functions have been unsurped by the federal courts, give this Court "workable standards to assist in preserving separation of powers and checks and balances." *Id.* at 1638.

For all of the reasons set forth herein, and in Petitioners' previously filed motions and briefs and in the Appendix attached hereto, this Honorable Court must fulfill Congress' intent in enacting the PLRA by enforcing the Tenth Amendment and the Guarantee Clause as the principal reasons for granting Intervenors' Motion to Terminate judicial control over the Texas prison system.

"The source of judicially enforceable rights of state sovereignty is not so much the text of the Tenth Amendment as it is the structural assumption of the constitution as a whole that the states will remain separate and meaningful decision-making, functioning governmental entitles." *Texas v. U.S.* 730 F.2d 339 (5th Cir. 1984). "Judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the constitution." *Garcia v. San Antonio Metro. Transit Authority,* 469 U.S. 528 (dissenting opinion by Rehnquist, C.J., and O'Connor) (1985).

The standing language of the PLRA also shows that this Honorable Court has an obligation to first rule on the Tenth Amendment, Guarantee Clause, and federalism issues raised by Intervenors' Motion to Terminate before reaching any of Movants' statutory arguments for termination under the PLRA. Where "Congress steps in and by statute creates standing . . . Congress has, in effect, asked the [federal] court[s] to decide . . . the merits of the constitutional issue[s and therefore, as a result] the [federal courts are] much more ready to decide the case on the merits . . . of the constitutional issue[s] at stake . . . If Congress speaks, either explicitly or implicitly, the [Supreme] Court will accept Congress' decision to confer standing to litigate constitutional . . . claims." *See* Rotunda and Nowak, *Treatise on Constitutional Law* §2.13 (West 1996). . . .

* * *

CONCLUSION

For all of the reasons set forth above, collectively or in the alternative, and in their previously filed Motion to Terminate attached to their Motion to Intervene, and Briefs and Exhibits in support thereof, Intervenors urge this Honorable Court to invoke its remedial powers including those powers under the Declaratory Judgment Act, or the All Writs Act, or the rules of equity, to immediately terminate all prospective Federal Court jurisdiction over the Texas prison system, and for such other and further relief, both at law and at equity, to which Intervenors may show themselves to be justly entitled.

Respectfully Submitted,

/s/ T. Gerald Treece
by permission JC
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Attorney for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of August, 1997 a true and correct copy of the foregoing document was served by First Class U.S. Mail, postage prepaid, on the following counsel of record.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-21003

DAVID R. RUIZ; ET AL.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Appellee,

v.

W. J. ESTELLE; TEXAS BOARD OF CORRECTIONS,

Defendants-Appellees,

v.

REPRESENTATIVE JOHN CULBERSON; SENATOR J. E. BROWN,

Movants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas, Houston

(Filed Dec. 16, 1998)

ORDER:

(X) The motion of appellees David Ruiz, et al., for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

* * *

/s/ Will Garwood
WILL GARWOOD
UNITED STATES CIRCUIT
JUDGE

18 U.S.C. § 3626(b)

* * *

(b) Termination of Relief. –

(1) Termination of prospective relief. – (A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener –

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) In the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief. – In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. – Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief. – Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

* * *

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18 U.S.C. § 3626(e)(2)

* * *

(2) Automatic stay. – Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period –

> (A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or
>
> > (ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

* * *

Supreme Court, U.S.
FILED
MAR 12 1999
OFFICE OF THE CLERK

No. 98-1121

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAVID RUIZ, ET AL., PETITIONERS

v.

REPRESENTATIVE JOHN CULBERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1491

QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. VIII, 110 Stat. 1321-66, authorized two individual Texas legislators to intervene in ongoing litigation to seek the termination of a consent decree previously entered in the case.

2. Whether individual state and local legislators who are granted a right to intervene under the PLRA must also demonstrate that they have a stake in the litigation sufficient to satisfy the standing requirements of Article III of the United States Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1121

DAVID RUIZ, ET AL., PETITIONERS

v.

REPRESENTATIVE JOHN CULBERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 161 F.3d 814.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1998. The petition for a writ of certiorari was filed on January 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Rule 24(a) of the Federal Rules of Civil Procedure is entitled "Intervention of Right" and provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to

> intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

2. In 1972, petitioners David Ruiz, et al., initiated a class action against Texas prison authorities, now the Texas Department of Criminal Justice-Institutional Division (TDCJ), alleging constitutional violations in Texas prisons. Pet. App. 2a. Following a 159-day trial, the district court found that the conditions of confinement in prisons operated by the TDCJ violated the Constitution, and it ordered injunctive relief to remedy the violations. *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1276, 1391 (S.D. Tex. 1980), aff'd in part, rev'd in part, 679 F.2d 1115, amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983). The court of appeals affirmed the district court's finding that the TDCJ's practices imposed cruel and unusual punishment on inmates in its custody, as well as its finding that some of those practices denied inmates due process of law. 679 F.2d at 1126. The court of appeals narrowed the scope of the relief ordered by the district court, however, finding that "some of the remedial measures ordered are not demonstrably required to protect constitutional rights and intrude unduly on matters of state concern." *Ibid.*; see Pet. App. 2a-3a.

In December 1992, the district court approved a comprehensive final judgment proposed by the parties. Pet. App. 3a. The 1992 final judgment terminated the district court's jurisdiction in all but eight substantive

areas, one of which was prison population and crowding conditions. *Ibid.*

3. In March 1996, the defendants filed a motion to terminate the 1992 final judgment so as to end the district court's supervisory role over the Texas prison system. Pet. App. 3a. On April 26, 1996, the President signed into law the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. VIII, 110 Stat 1321-66. Section 802 of the Act amended 18 U.S.C. 3626 to establish standards for the entry and termination of prospective relief in civil actions concerning conditions in prisons, jails, and juvenile detention facilities. See 110 Stat. 1321-66 to 1321-70 (18 U.S.C. 3626 (Supp. II 1996)). On May 21, 1996, the respondent state legislators—Representative John Culberson and Senator J.E. ("Buster") Brown—filed a motion to intervene in the district court, pursuant to 18 U.S.C. 3626(a)(3)(F) (Supp. II 1996). Pet. App. 3a. At that time, the PLRA granted a right of intervention to:

> [a]ny State or local official or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of program facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order.

18 U.S.C. 3626(a)(3)(F) (Supp. II 1996). Culberson and Brown also filed a proposed motion to vacate the 1992 final judgment pursuant to 18 U.S.C. 3626(b)(2) (Supp. II 1996).[1] Pet. App. 3a.

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[1] Section 3626(b)(2) provides that "[i]n any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by

4. In an order signed on November 21, 1997, and entered on November 24, 1997, the district court denied respondents' motion to intervene. Pet. App. 4a. The court held that respondents, as individual legislators, were not among the state and local officials authorized to intervene under the PLRA, because only legislative bodies, not individual legislators, have the jurisdiction or function of appropriating funds. *Ruiz* v. *Scott*, No. H-78-987 (S.D. Tex. Nov. 24, 1997), slip op. 2-4.

On November 26, 1997, the President signed into law amendments to the PLRA. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 123, 111 Stat. 2470. Section 123(a)(1)(B)(ii)(I) of that law amended 18 U.S.C. 3626(a)(3)(F) (Supp. II 1996) by adding the phrase "including a legislator" immediately following the phrase "State or local official." 111 Stat. 2470. Based on that amendment, Culberson and Brown moved in the district court for reconsideration of the denial of their motion to intervene. Pet. App. 4a. The district court denied reconsideration, finding that the "amendment does not eviscerate the qualifying language of the provision mandating that, in order to be granted the statutory right to intervene, officials or units of government have the jurisdiction or function of the appropriation of funds." *Ruiz* v. *Scott*, No. H-78-987 (S.D. Tex. Jan. 28, 1998), slip op. 8. The district court also found that the consent decree was not a "prisoner release order" within the meaning of the PLRA. Slip op. 1-7.

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the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

5. The court of appeals reversed. Pet. App. 1a-48a.

a. The court of appeals first held that under the November 1997 amendment, Culberson and Brown were within the class of officials entitled to intervene as of right in prison litigation covered by the PLRA. Pet. App. 7a-16a. The court acknowledged that in some contexts, an individual legislator might be deemed not to have the "jurisdiction or function" of appropriating funds, since such action can be accomplished only by the legislative body as a whole. *Id.* at 10a-11a. It concluded, however, that Congress's addition of the phrase "including a legislator" would have been pointless unless Congress had intended to authorize individual legislators to invoke the PLRA's intervention provision. *Id.* at 12a-13a. The court also found that its interpretation was supported by the timing of the amendment and its legislative history. *Id.* at 13a-15a.

b. The court next held that the 1992 final judgment in this case was a "prisoner release order" subject to the intervention provision of the PLRA. Pet. App. 16a-31a. The court rejected the district court's holding that the term "prisoner release order" does not include consent decrees. *Id.* at 17a-27a. The court also held, contrary to the district court's determination, that the 1992 final judgment fell within the PLRA's definition of "prisoner release order" as an order "that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. 3626(g)(4) (Supp. II 1996). The court acknowledged that the State of Texas could theoretically comply with the density limitations contained in the 1992 final judgment by constructing new prisons to house additional inmates. Pet. App. 28a-30a. The court nevertheless held that the final judgment constitutes a "prisoner release order" because its

effect is "to limit the total number of prisoners incarcerated in the Texas prison system to 51,067, at least unless and until additional incarceration facilities are constructed." *Id.* at 30a. The court also found that Culberson and Brown had invoked the PLRA intervention proyision in a timely fashion. *Id.* at 31a-34a.

c. Finally, the court of appeals held that Section 3626(a)(3)(F), if construed to grant individual legislators an unconditional right to intervene in ongoing prison litigation, does not violate Article III of the Constitution. Pet. App. 35a-47a. The court found it "doubtful that, if Brown and Culberson were the only parties before the court seeking termination of (or other relief respecting) the Final Judgment, they would have sufficient standing so that the district court would be presented with an Article III case or controversy." *Id.* at 37a. It concluded, however, that "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." *Id.* at 38a. The court also noted that in this case, unlike *Diamond* v. *Charles*, 476 U.S. 54 (1986), the putative intervenors had not sought to appeal any merits ruling that the original defendants had declined to appeal. Pet. App. 47a n.28.

ARGUMENT

The decision of the court of appeals in this case is the only appellate decision to date to construe the 1997 PLRA amendment granting state legislators a right of intervention in ongoing prison litigation. Although the courts of appeals have expressed divergent views regarding the "interest" that a putative intervenor must

demonstrate to satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2), the instant case does not present that question. The petition for a writ of certiorari should therefore be denied.

1. Petitioners contend that respondents Culberson and Brown do not satisfy the statutory criteria for intervention under the PLRA because (1) individual legislators do not have jurisdiction to appropriate funds and therefore do not come within the class of officials authorized to intervene (Pet. 21-22), and (2) the 1992 final judgment was not a "prisoner release order" within the meaning of the PLRA (Pet. 22-25). Petitioners do not contend that the Fifth Circuit's resolution of the pertinent statutory issues conflicts with any decision of this Court or of another court of appeals. Indeed, no other appellate court has construed the 1997 PLRA amendment adding the phrase "including a legislator" to the Act's intervention provision. Further review of petitioners' statutory claims is therefore unwarranted.

2. Petitioners' primary argument (Pet. 8-20) is that respondents Culberson and Brown are constitutionally foreclosed from intervening in this lawsuit because they lack a judicially cognizable interest in the outcome of the case. That argument lacks merit and does not warrant this Court's review.

a. In holding that Culberson and Brown would be permitted to intervene, the court of appeals did not suggest that those legislators would be entitled to assert all of the prerogatives available to the other parties to the case. Rather, the court's decision was carefully limited. The court held only that "Article III does not require intervenors to independently possess standing where the intervention is into a subsisting and continuing Article III case or controversy and the

ultimate relief sought by the intervenors is also being sought by at least one subsisting party with standing to do so." Pet. App. 38a. The court recognized that under *Diamond* v. *Charles*, 476 U.S. 54 (1986), intervenors who do not possess Article III standing cannot appeal an adverse district court ruling if the parties with whom they are aligned have declined to do so. See Pet. App. 39a-40a, 47a n.28. See also *Goldin* v. *Bartholow*, Nos. 97-20852 et al., 1999 WL 33241, at *11 n.12 (5th Cir. Jan. 26, 1999) (if intervenors "are the sole party to take an appeal they must independently satisfy Article III").

The court of appeals' approach furthers Congress's intent to permit intervention by state legislators in appropriate cases, without transgressing the limits set by Article III. Article III confines the jurisdiction of the federal courts to actual "Cases" and "Controversies" (U.S. Const. Art. III, § 2), and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). But so long as an intervenor enters an ongoing controversy in order to request the same relief sought by parties who *do* have Article III standing, and does not seek to prolong the litigation after other parties have declined to appeal, his participation creates no danger that the federal court will operate beyond its proper sphere.

b. Petitioners also contend (Pet. 11-20) that respondents Culberson and Brown should be required to demonstrate Article III standing because they seek to raise legal theories different from those asserted by the other defendants in the case. As the court of appeals recognized (Pet. App. 46a), however, nothing in Article III prohibits a federal court from considering legal arguments that have not been raised by a party to the

case. Thus, while a federal court may decline for prudential reasons to address arguments raised only by an amicus curiae, nothing in the Constitution precludes it from considering such arguments if it chooses to do so. See, *e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion) (O'Connor, J.); *Mapp* v. *Ohio*, 367 U.S. 643, 646 n.3 (1961). So long as an intervenor who lacks Article III standing seeks the same ultimate disposition of the case as does another party, its articulation of different legal bases for that disposition creates no constitutional problem.[2]

c. There is a "considerable diversity of views," *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996), regarding the "interest" a party must possess to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. See also *Diamond*, 476 U.S. at 68-69 n.21. Some courts have held that a Rule 24(a)(2) intervenor must satisfy Article III standing requirements. *Mausolf*, 85 F.3d at 1299 (citing cases). Others have read Rule 24(a)(2)'s requirement of an "interest relating to the property or transaction which is the subject of the action" as requiring a stronger interest than is needed to satisfy Article III standing, while still other

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[2] Petitioners also assert that "[i]n fact, Brown and Culberson seek relief *beyond* that sought by the state defendants." Pet. 18 n.7. The court of appeals, however, decided this case on the express assumption that "Brown and Culberson seek the same ultimate relief as the TDCJ: the termination of the Final Judgment." Pet. App. 46a. Insofar as petitioners contest the correctness of that assumption, their challenge raises no legal issue of general importance. If the intervenors attempt at some future stage of the litigation to obtain relief different from (or in addition to) that requested by the other defendants, nothing in the court of appeals' opinion suggests that the district court may or should entertain their claims.

courts have read the Rule to require a *less* substantial interest than is mandated by Article III. *Mausolf*, 85 F.3d at 1299 (citing cases).

The instant case, however, does not provide a suitable vehicle for clarification of Rule 24(a)(2)'s "interest" requirement. The court of appeals specifically declined to decide whether putative intervenors under Rule 24(a)(2) must demonstrate Article III standing. Pet. App. 44a n.26. Rather, the court held that Culberson and Brown were entitled to intervene under Rule 24(a)(1) because the PLRA, as amended in November 1997, "confers an unconditional right to intervene." See Pet. App. 6a, 31a.

Two courts of appeals, addressing the right to intervene under Rule 24(a)(2), have held that Article III standing is required by the Constitution. See *Southern Christian Leadership Conference* v. *Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984); *Mausolf*, 85 F.3d at 1298-1301. Those courts reached that conclusion, however, at least partly because they construed Rule 24(a)(2) to grant the intervenor all of the rights of an Article III party. See *Building & Constr. Trades Dep't* v. *Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("we have held that because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties"); *Mausolf*, 85 F.3d at 1300-1301 (same).

The court of appeals in this case did not suggest that an intervenor may be granted the full rights of a party without establishing that he possesses Article III standing. In essence, the court simply held that Congress is not restricted to an all-or-nothing choice. Consistent with Article III, persons who lack standing to sue may permissibly be denominated "intervenors," and

treated as parties for *some* purposes, even though they may not constitutionally be vested with *all* of the prerogatives normally associated with party status. The Eighth and D.C. Circuit decisions cited above do not squarely address the propriety of that approach. Cf. *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996) (Posner, C.J.) (noting the divergent views among the courts of appeals regarding the "interest" required by Rule 24(a)(2), but observing that "there is less to [the conflict] than meets the eye, since *Diamond* makes clear that a case must be dismissed if the only party on one side of the suit is an intervenor who lacks standing").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1998

DAVID RUIZ, et al.,

Petitioners,

v.

REPRESENTATIVE JOHN CULBERSON and SENATOR J.E. ("BUSTER") BROWN,

Respondents.

On Petition For Writ Of Certiorari To The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The United States, though nominally a plaintiff-intervenor in the district court, has not actively participated in this case in years. The government did not participate at all in the appeal that gives rise to the instant petition for writ of certiorari. It nonetheless has filed a brief in opposition ("USBr.").

Perhaps because it did not participate below, the United States misconceives the central issue presented by the Petition. It states that although the courts of appeals have reached divergent results on what "interest" an intervenor must have to satisfy Rule 24(a)(2), this case does not present that question and "therefore" the petition should be denied. USBr. at 6-7, 9-10. The government argues that this case is not a "suitable vehicle" for "clarification" of the Rule 24(a)(2) "interest" requirement. *Id.* at 10. Petitioners wholeheartedly agree. The issue presented by the Petition has nothing to do with Rule 24(a)(2). The issue is whether prospective intervenors must possess Article III standing, regardless of whether intervention is sought under subsection (a)(2) of Rule 24 or, as in this case, subsection (a)(1). On *that* important issue there is clearly a conflict among the Circuits that requires resolution by this Court. In conflict with the decisions of three other circuits, the court below held that no Article III standing is required for the intervention in this case.

Not only do respondents Brown and Culberson lack Article III standing, but they seek to have litigated novel

federal constitutional issues not raised by any existing party, and they seek relief (nullification of the district court's Final Judgment) not sought by any existing party. The government mistakenly argues that Brown and Culberson are seeking the "same relief" as the state defendants and the "same ultimate disposition" of the case. USBr. at 8-9. In fact, they expressly seek relief, on Tenth and Eleventh Amendment grounds, going far beyond the relief sought by the state defendants, which is simply termination of prospective injunctive relief pursuant to the Prison Litigation Reform Act. The government makes reference to this in a footnote (USBr. at 9, n.2), but concludes that if Brown and Culberson press their claims, "nothing in the court of appeals' opinion suggests that the district court may or should entertain their claims." This, together with the government's argument that Brown and Culberson will not have the right to appeal an adverse decision or otherwise enjoy "the full rights of a party" (*id.* at 7, 10), demonstrates that the court of appeals plainly erred in holding that they have an "unconditional right" to intervene within the meaning of Rule 24(a)(1). Either they have an unconditional right to litigate the claims they expressly raised in their motion to intervene, or they should not have been granted intervention under the Rule. And, as the Petition before the Court urges, persons claiming a right to intervene must have Article III standing.

Accordingly, the Court should grant the petition for certiorari to decide whether Congress can confer on

persons without Article III standing an unconditional right to litigate in federal court.

Respectfully submitted,

Dated: March 1999

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OCTOBER TERM, 1998

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United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Gary L. Johnson, Texas Department of Criminal Justice, Institutional Division; Allan B. Polunsky, Carole S. Young, John R. Ward, John David Franz, Nancy Patton, Carol S. Vance, Patricia Day, Alfred C. Moran, and Alfred M. Stringfellow; and Representative John Culberson and Senator J.E. "Buster" Brown file this Brief in Opposition to the Petition for Writ of Certiorari.[1]

Since Judge William Wayne Justice first held the Texas prison system unconstitutional in 1980, Texas has undertaken the most massive prison restructuring effort in history. Texas has spent billions of dollars constructing new prisons and renovating old

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1. Although the prison official Respondents originally opposed Representative Culberson's and Senator Brown's intervention below, they now support the intervention and join this brief in opposition.

ones. The State has hired and trained thousands of additional guards and other correctional personnel. Under the district court's watchful eye, the prison system restructured and rewrote every conceivable prison policy and procedure to meet not only constitutional standards, but also the latest in accepted correctional practices.

Despite the State's efforts, in the early 1990s Respondents Representative John Culberson and Senator J.E. "Buster" Brown, who served on the corrections committees in their respective branches of the Texas Legislature, perceived that there was little or no movement toward terminating federal court control over the Texas prison system. Abandoning efforts to terminate federal control, then Attorney General Dan Morales in 1992 abruptly agreed to a consent decree that terminated federal jurisdiction over some issues, but left intact federal jurisdiction over numerous other areas of prison management, preventing the state legislature from re-assuming its constitutionally and statutorily guaranteed authority over the state prison system. Frustrated by their perception that the State was not aggressively seeking to end the federal court's pervasive supervision of the prison system, Culberson and Brown turned to Congress for authorization to intervene directly into the *Ruiz* litigation to seek termination of the longstanding injunctive relief.

On April 26, 1996, President Clinton signed into law the Prison Litigation Reform Act, Pub. L. 104-134, Title 8, §802(a), 110 Stat. 1321-66 (codified at 18 U.S.C. §3626). Section 3626(a)(3)(F) of the PLRA, as amended,[2] provides:

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2. Section 3626(a)(3)(F) as originally enacted did not contain the term "including a legislator," and the term "prison facilities" originally read "program facilities."

> Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief, and shall have the right to intervene in any proceeding relating to such relief.

18 U.S.C. §3626(a)(3)(F). On May 21, 1996, less than a month after the PLRA's enactment, Culberson and Brown moved both to intervene in the case and to terminate the 1992 judgment.

The district court took no action on the motion to intervene for eighteen months, effectively blocking the intervention effort during that time. The district court finally entered an order denying the intervention on November 24, 1997, and an order denying Respondents' motion for reconsideration on January 28, 1998. The Fifth Circuit on November 20, 1998, issued its judgment reversing the district court and ordering that Representative Culberson and Senator Brown be permitted to intervene.

ARGUMENT

Representative Culberson and Senator Brown originally sought to intervene in this suit under Rule 24(a) of the Federal Rules of Civil Procedure, which states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's

ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a). Representative Culberson and Senator Brown asserted that the intervention provision in §3626(a)(3)(F) of the PLRA authorized their intervention under Rule 24(a)(1).[3] Petitioners argued in response that the intervention provision did not apply and, even if it did, permitting the intervention would violate Article III standing requirements.

The Fifth Circuit properly held that Article III does not require intervenors to possess independent standing to intervene in an ongoing case or controversy. *Ruiz*, 161 F.3d at 830. For the reasons that follow, this case does not warrant review by the Court.

I. THE COURT SHOULD DENY THE PETITION BECAUSE, ALTHOUGH THERE IS A CIRCUIT SPLIT, THIS CASE IS NOT THE PROPER VEHICLE TO RESOLVE IT.

A. There Is a Circuit Split.

The primary issue raised by the petition is standing. Respondents acknowledge, as they must, that the circuits are in conflict regarding whether all prospective Rule 24 intervenors must independently demonstrate Article III standing.[4] Because contested

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3. Representative Culberson and Senator Brown also sought to intervene as of right under Rule 24(a)(2) and permissively under Rule 24(b). Because the court of appeals held that their intervention was authorized under Rule 24(a)(1), it never reached those arguments. *Ruiz v. Estelle*, 161 F.3d 814, 827 n.21 (CA5 1998).

4. The Fifth Circuit properly noted that most of the cases cited in footnote 21 in *Diamond v. Charles*, 476 U.S. 54, 68 (1986), were focused primarily on defining Rule 24(a)(2)'s interest requirement. *Ruiz*, 161 F.3d at 831. The court also noted, however, that some of those circuits have subsequently adopted a broader standing requirement. *Id.*

Rule 24(a)(1) interventions are relatively uncommon, the Fifth Circuit is the first court of appeals to address Article III standing in the specific context of a Rule 24(a)(1) intervention. However, the circuits have repeatedly addressed the standing issue in the context of Rule 24(a)(2) interventions.

Most of the courts of appeals to address the issue have found that a party seeking to intervene need not first demonstrate Article III standing. *See Ruiz*, 161 F.3d at 829-33; *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (CA6 1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (CA9 1991);[5] *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (CA11 1989); *United States Postal Service v. Brennan*, 579 F.2d 188, 190 (CA2 1978). According to these circuits, once the case or controversy requirement is satisfied by the original parties to the lawsuit, Article III does not require an intervenor to independently demonstrate standing.

The existence of an Article III case or controversy is established by the original parties—not by the intervenor. *Brennan*, 579 F.2d at 190 ("The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor."). Because, by definition, it is the plaintiff who initiates the case and defines the controversy by its complaint, courts have long focused their Article III assessment on the allegations in the plaintiff's complaint. It is the plaintiff, therefore, who must satisfy Article III's case or controversy requirement; and it is the plaintiff

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5. *See also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (CA9 1995) (holding that intervenor appellants need only supply an Article III case or controversy when the original defendants have acquiesced); *Legal Aid Soc'y of Alameda City v. Brennan*, 608 F.2d 1319, 1328 n.9 (CA9 1979) (same); *United States v. Imperial Irrigation Dist.*, 559 F.2d 509, 521 (CA9 1979) (holding that Rule 24 intervenor need not have the standing required to initiate suit).

who "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 2317 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

The standing doctrine does not exist separate and apart from the case or controversy requirement—rather, it is one of the tests by which courts determine whether the constitutional requirement is satisfied in a given case. Once a plaintiff successfully initiates suit, an Article III case or controversy exists and no further showing is necessary. Requiring an intervenor to demonstrate Article III standing improperly and unnecessarily reopens an issue that has previously been resolved. "Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene." *Chiles*, 865 F.2d at 1212.

In contrast, three courts of appeals have held that a prospective intervenor must demonstrate Article III standing. *See Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 465 (CA7 1998); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (CA8 1996); *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (CADC 1994) (per curiam).

The Seventh Circuit, in an opinion authored by Chief Judge Posner, recently reaffirmed its rejection of the majority view. *Doyle*, 162 F.3d at 465 ("A purely ideological interest is not an adequate basis for standing to sue in a federal court—and we require such standing of all would-be intervenors." (citations omitted));[6] *see also People Who Care v. Rockford Bd. of Educ.*, __ F.3d __, 1999 WL 148036, at *6 (CA7 Feb. 8, 1999). In *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 101 F.3d 503, 507 (CA7 1996),

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6. In its Brief in Opposition, the United States failed to acknowledge the Seventh Circuit's broad intervenor standing requirement.

which both *Doyle* and *People Who Care* cited, the Seventh Circuit suggested that its intervenor-standing requirement may be based on prudential considerations: "because intervention can impose substantial costs on the parties and the judiciary . . . the would-be intervenor will not be permitted to push wide the already wide boundaries of Article III standing." *Id.* at 507.

The Eighth Circuit in *Mausolf* expressly rejected prior cases advocating the majority view and adopted a structural view of Article III that requires all parties, including intervenors, to demonstrate standing:

> In our view, an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.

Mausolf, 85 F.3d at 1300; *see also Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 (CA8 1998). The court believed that the Constitution requires an independent showing of standing and, therefore, declared that Congress lacks authority to permit—by rule or statute—intervention by one who cannot independently demonstrate standing. *Mausolf*, 85 F.3d at 1300.

Finally, the D.C. Circuit also requires a showing of standing. "[B]ecause a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties." *City of Cleveland*, 17 F.3d at 1517; *see also Building & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (CADC 1994).

B. The Petition Should Be Denied Because There Are Issues That Cannot Be Resolved in This Case.

Although Respondents cannot adopt the United States' suggestion that Rule 24(a)(2) cases are inapplicable, the United States is correct in asserting that this case cannot resolve the proper interpretation of the term "interest" in Rule 24(a)(2). The Fifth Circuit's holding that Article III does not independently require standing of all intervenors recognizes that Rule 24(a)(2) could be—and has been—interpreted by some courts to require a showing of "interest" similar or identical to a showing of Article III standing. But, although there is considerable disagreement about the scope of the interest an intervenor must prove to satisfy Rule 24(a)(2), *Diamond*, 476 U.S. at 68, the Court cannot decide in this case what interest Rule 24(a)(2) requires because Rule 24(a)(1) does not require that showing.

The Court in *Diamond* declined to decide whether a Rule 24(a)(2) intervenor must demonstrate Article III standing in addition to the general requirements of the Rule, notwithstanding its acknowledgment of the "anomalous decisions" in the courts of appeals. *Id.* at 68-69 ("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III."). The Court in *Diamond* stated that the focus of the confusion was the "relationship between the interest required to satisfy the Rule and the interest required to confer standing." *Id.*; *see also Ruiz*, 161 F.3d at 830-33.

This case is not a proper vehicle to address the issues left unresolved in *Diamond*. Because this case primarily involves Rule 24(a)(1), the Fifth Circuit properly declined to consider whether proof of standing is mandatory under the "interest" prong of Rule 24(a)(2):

> Like the Supreme Court in *Diamond*, we are not today presented with the proper interpretation of Rule 24(a)(2). Our holding is simply that Article III does not require intervenors to have standing as a matter of constitutional law. Whether intervention under Rule 24(a)(2) requires such a showing, we do not today consider.

Ruiz, 161 F.3d at 832 n.26. Accordingly, the Fifth Circuit left open whether the "interest" required of a prospective intervenor under Rule 24(a)(2) must rise to the level of Article III standing.

The posture of this case prevents it from being a proper vehicle for the Court to fully resolve the circuit split raised by Petitioners. Without an independent standing requirement, nothing in Rule 24(a)(1) mandates or even authorizes an analysis of the prospective intervenor's "interest" in the subject matter of the lawsuit. *Harris v. Reeves*, 946 F.2d 214, 222 n.10 (CA3 1991). When a federal statute grants a right to intervene, the district court simply never reaches the issue of the prospective intervenor's interest in the action. *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1231 n.4 (CA3 1994); *see Blake v. Pallan*, 554 F.2d 947, 951 (CA9 1977) ("Rule 24(a)(2) establishes a four-fold test for intervention of right in those situations not covered by an unconditional statutory right to intervene under Rule 24(a)(1).").

A decision in this case could potentially resolve whether all intervenors must demonstrate Article III standing as a constitutional matter, but it could not address the standing-related interpretation of the "interest" requirement of Rule 24(a)(2), which was left open in *Diamond*. If, for example, the Court were to rule that intervenor standing is not constitutionally required, then the Court would not reach the meaning of "interest" under Rule 24(a)(2) because it is not presented in this case. Even if the Court were to rule that intervenor standing is constitutionally required, the Court would be unable in this case to say whether the "interest" prerequisite in Rule 24(a)(2) requires a similar or more substantial showing than Article III itself.

The Court simply cannot use this case to decide what interest is required by Rule 24(a)(2). Because the overwhelming majority of the cases in which the standing issue arises involve Rule 24(a)(2) interventions, an opinion in this Rule 24(a)(1) case would have relatively little precedential value and is unlikely to put to rest the "anomalous decisions" concerning the interpretation of Rule 24(a)(2).

Petitioners seek the Court's review in order to prohibit Representative Culberson and Senator Brown from exercising their statutory right to intervene in this case. The Fifth Circuit correctly rejected Petitioners' arguments. This case does not present the Court with a meaningful opportunity to address the questions left open by the Court in *Diamond* and, therefore, does not deserve the Court's review.

II. Petitioners' Statutory Construction Arguments Do Not Merit the Court's Review.

Petitioners argue that the Court should grant certiorari to reverse the Fifth Circuit's holding in this case because the PLRA did not grant Representative Culberson and Senator Brown an unconditional right to intervene. Petitioners' argument is two-fold: (1) the PLRA does not grant a right to intervene to individual legislators; and (2) the final judgment does not qualify as a "prisoner release order" under the PLRA. The Fifth Circuit is the first court of appeals to address the interpretation of the PLRA's intervention provision and Respondents are unaware of any other pending litigation in which that provision has been invoked by state legislators. In any event, the Fifth Circuit properly interpreted §3626(a)(3)(F). Without any showing of a circuit split or a question of fundamental importance, the Fifth Circuit's interpretation of the PLRA's intervention provision does not merit the Court's review.

A. The PLRA Grants Representative Culberson and Senator Brown the Right to Intervene.

The PLRA's broad intervention provision grants legislators and certain other officials wide latitude to intervene in prison conditions lawsuits. Specifically, the PLRA grants intervention rights to:

> [a]ny State or local official *including a legislator* or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities . . . .

18 U.S.C. §3626(a)(3)(F) (emphasis added). Petitioners attempt to distort this language and undercut the Fifth Circuit's decision by arguing that this language only permits intervention by the legislature as a whole, or by parties who can act with the full power and authority of the legislature. Pet. 21-22.

Section 3626(a)(3)(F) cannot reasonably be read to exclude an individual legislator's right to intervene. Petitioners attempt to graft onto the language of §3626(a)(3)(F) a requirement that a prospective intervenor have the full authority individually to appropriate funds, but nothing in the text or structure of the statute requires or even supports that reading. The language "jurisdiction or function" does not suggest full, complete, and independent power to appropriate funds. No individual legislator has that authority.

Rather, the only way to give meaning to the statutory language is to read it to include state legislators who are involved in the process of appropriating funds for prisons. For example, it would be natural and appropriate to say that the "jurisdiction and function" of an individual justice of this Court includes hearing and deciding cases, even though only the full Court can actually issue a decision and judgment in a given case. To give any meaning to Congress's express contemplation of legislator intervention, the statute must apply to "a legislator . . . whose jurisdiction or function includes the

appropriation of funds," and that language must, by its common and natural usage, mean individual state legislators whose "jurisdiction or function" includes the power to introduce, amend, and vote on the appropriation of funds for the construction, operation, or maintenance of prison facilities. The Court may not, as Petitioners suggest, adopt a strained interpretation of the statute that reads out as inoperative the very language Congress added to clarify that it intended to permit individual legislators to intervene in prison conditions cases. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

In a case such as this, where the language of the statute is clear, the Court's analysis should begin and end with the language itself. *Hughes Aircraft Co. v. Jacobson*, ___ U.S. ___, 119 S.Ct. 755, 760 (1999). In the face of Congress's plain grammatical intent that the phrase "including a legislator" modify "[a]ny State or local official," Petitioners may not properly seek to equate the term "legislator" with "unit of government," essentially attempting to read legislator standing completely out of the statute. The Court has consistently expressed a deep reluctance to interpret a statute such that one part of it renders another part merely superfluous, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991); *see also Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 1976 (1998), and the Court must generally avoid construing one provision in a statute so as to suspend or supersede another provision. *Rake v. Wade*, 508 U.S. 464, 471 (1993). The words "a legislator" cannot be read to be meaningless.

Congress intended to grant individual legislators the right to intervene to protect their legislative interests in part because the typical continuing injunctive provisions in judgments arising in prison litigation severely limit the authority of state legislatures to control the construction, operation, and maintenance of prison facilities. Representative Culberson and Senator Brown are both members of the Texas Legislature whose jurisdiction or function

includes the appropriation of funds for the construction, operation, or maintenance of prison facilities.

Congress intended to give these particular legislators the right to intervene under §3626(a)(3)(F). Congress amended the language of the PLRA to include "a legislator" largely in response to the Fifth Circuit's expressed doubts in this very case about Representative Culberson's and Senator Brown's right to intervene under the prior statutory language. *Ruiz*, 161 F.3d at 820-21. The Fifth Circuit noted that the amendment's sponsor issued a press release stating:

> "I wanted . . .the judges on the Fifth Circuit to know, despite their misinterpretations of Congress' original intent, legislators were meant to have the right to intervene in prison lawsuits, and now that right is explicit. . . . The amendments I sponsored . . . [make] it absolutely clear that Judge Justice must immediately end his unjustifiable blockade of the [Respondents' lawsuit]."

Id. at 820 (quoting press release from the office of Congressman Tom DeLay).

The Fifth Circuit properly held that §3626(a)(3)(F) authorized Representative Culberson and Senator Brown to intervene in this lawsuit. The Court should not revisit the circuit court's decision.

B. The Final Judgment Is Clearly a "Prisoner Release Order" Under the PLRA.

Petitioners also attempt to block Representative Culberson's and Senator Brown's intervention by improperly arguing that the final judgment is not a "prisoner release order" under the PLRA. The Fifth Circuit's analysis is fully consistent with the Eighth Circuit's discussion in *Tyler v. Murphy*, 135 F.3d 594 (CA8 1998), and there is no conflict among the circuits on that issue.

Section 3626(a)(3)(F) permits legislators to intervene "in any proceeding relating to [a prisoner release order]." The PLRA defines a "prisoner release order" to include: "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." 18 U.S.C. §3626(g)(4). The court of appeals properly determined that the final judgment contained specific numerical caps at a number of prisons and a separate system-wide cap that could be avoided only by constructing new prisons—which, of course, Texas has had to do. *Ruiz*, 161 F.3d at 826-27.

Petitioners' argument that the final judgment is not a prisoner release order because it is a consent order "not only flies in the face of both the language of the PLRA and the manifest intent of Congress, but likewise wrenches [*Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986)] out of context and stands it on its head." *Ruiz*, 161 F.3d at 825. *Firefighters* recognized that consent decrees have characteristics of both contracts and judicial orders and held only that the consent decree at issue was not a prohibited order under §706(g) of Title VII. Nothing in *Firefighters* even remotely suggests that consent decrees are not orders in the general sense. In any event, unlike §706(g) of Title VII, the PLRA clearly considers consent decrees to be orders. 18 U.S.C. §§3626(c)(1), (c)(2)(A), (g)(7), (g)(9); *Ruiz*, 161 F.3d at 825.

Petitioners also wrongly assert that the final judgment is not a prisoner release order because it does not unalterably limit the prisoner population of the entire Texas prison system. The Fifth Circuit explicitly found, and Petitioners do not deny, that the final judgment expressly limits the population of various Texas prisons. *Ruiz*, 161 F.3d at 827; Pet. 24. Further, the final judgment limits the total number of prisoners incarcerated in Texas unless and until

additional prison facilities are built. *Id.* at 827. Under Petitioners' view, no order can be a prisoner release order unless it not only caps prisoner populations, but also prohibits the construction of new facilities. That interpretation is patently unreasonable and is neither suggested nor justified by the language of §3626(g)(4). As the Eighth Circuit properly held in *Tyler*, even a cap on a class of prisoners in a single unit may be a prisoner release order as long as it satisfies the language of §3626(g)(4). *See Tyler*, 135 F.3d at 596-97.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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